No. 14-8913

Title:	Saul Molina-Martinez, Petitioner
	v.
	United States
Docketed:	March 18, 2015
Lower Ct.:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(13-40324)
Decision Date:	December 17, 2014

Questions Presented

—Date—	——Proceedings and Orders——————————
Mar 16 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 17, 2015)
Apr 8 2015	Order extending time to file response to petition to and including May 18, 2015.
Apr 24 2015	Order further extending time to file response to petition to and including June 18, 2015.
Jun 10 2015	Brief of respondent United States in opposition filed.
Jun 11 2015	Reply of petitioner Saul Molina-Martinez filed.
Jun 25 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 16 2015	Joint appendix filed. (Statement of costs filed)
Nov 16 2015	Brief of petitioner Saul Molina-Martinez filed.
Nov 24 2015	SET FOR ARGUMENT on Tuesday, January 12, 2016
Dec 4 2015	Record requested from U.S.C.A. 5th Circuit.
Dec 15 2015	CIRCULATED.
Dec 16 2015	Brief of respondent United States filed. (Distributed)
Jan 4 2016	Reply of petitioner Saul Molina-Martinez filed. (Distributed)
Jan 12 2016	Argued. For petitioner: Timothy Crooks, Assistant Federal Public Defender, Houston, Tex. For respondent: Scott A.C. Meisler, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jan 19 2016	Record from the U.S.D.C. Southern District of Texas is electronic and also received in hard copy. (1 Envelope)
Apr 20 2016	Judgment REVERSED and case REMANDED. Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in part and concurring in the judgment, in which Thomas, J., joined.
May 23 2016	JUDGMENT ISSUED

NO. 14-8913

IN THE SUPREME COURT OF THE UNITED STATES

SAUL MOLINA-MARTINEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

TIMOTHY CROOKS
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

QUESTION PRESENTED

In United States v. Olano, 507 U.S. 725 (1993), the Court held that, in order to secure relief under plain-error review pursuant to Federal Rule of Criminal Procedure 52(b), a defendant must show that the error affected his substantial rights, which "in most cases [ ] means that the error must have been prejudicial[, i.e.,] [i]t must have affected the outcome of the district court proceedings." Id. at 734 (citations omitted). The Court, however, declined to "decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial,'" id. at 735 (citations omitted); and the Court suggested that "[some] errors [ ] should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice." Id.

Since that time, at least two circuits have, in connection with errors in the application of the United States Sentencing Guidelines, adopted the very sort of presumption suggested in Olano: that is, they presume an effect on substantial rights when an error results in the application of an erroneous Guideline range to a criminal defendant. See United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014); United States v. Knight, 266 F.3d 203, 207-10 (3d Cir. 2001). In this case, however, the Fifth Circuit rejected such a presumption as foreclosed by its prior decisions. See United States v. Molina-Martinez, 588 Fed. Appx. 333, 334 n.1 (5th Cir. 2014) (unpublished).

In light of the foregoing, the question presented is as follows:

> Where an error in the application of the United States Sentencing Guidelines results in the application of the wrong Guideline range to a criminal defendant, should an appellate court presume, for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b), that the error affected the defendant's substantial rights?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

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The federal circuits are divided respecting the proper application of the third prong of plain-error review (the "affected substantial rights" prong) to plain errors resulting in the application of the wrong Sentencing Guideline range to a criminal defendant. At least the Third and the Tenth Circuits presume

that such errors affected a defendant's substantial rights, whereas at least the Fifth Circuit has declined to adopt such a presumption. Because the application of the third prong of plain-error review to Guideline calculation errors is an important and frequently recurring question in the federal courts of appeals, the Court should grant certiorari in this case to resolve that division. 10

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PRAYER

Petitioner Saul Molina-Martinez respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on December 17, 2014.

OPINION BELOW

On December 17, 2014, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. The Westlaw version of the Fifth Circuit's opinion is reproduced in the appendix to this petition.

JURISDICTION

On December 17, 2014, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. This petition is filed within 90 days of that date and therefore is timely. See Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The question presented involves Federal Rule of Criminal Procedure 52(b), which provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

STATEMENT OF THE CASE

A. Course of proceedings.

Petitioner Saul Molina-Martinez ("Mr. Molina-Martinez") pleaded guilty to an indictment charging him with being found unlawfully present in the United States after deportation, in violation of 8 U.S.C. § 1326(a) and (b). The district court sentenced Mr. Molina-Martinez to 77 months' imprisonment and three years of supervised release.

On March 18, 2013, Mr. Molina-Martinez filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. On December 17, 2014, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. Molina-Martinez, 588 Fed. Appx. 333, 335 (5th Cir. 2014) (unpublished) (Appendix).

B. Statement of the relevant facts.

1. Sentencing.

After Mr. Molina-Martinez's plea, the court ordered that a presentence report ("PSR") be prepared to assist the court in sentencing Mr. Molina-Martinez. In calculating the United States Sentencing Guidelines ("USSG") applicable to Mr. Molina-Martinez, the PSR calculated a total offense level of 21.

The PSR then calculated Mr. Molina-Martinez's criminal history score under the Guidelines, in the following manner:

Date of sentence	Offense and sentence	USSG §	Points	PSR ¶
3/6/02	Speeding/no driver's license: 18 days' custody	4A1.2(c)(1)	0	24
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(a)	3	25
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(e)	1	26
1/19/07	Illegal entry into the United States: time served (about 2 days)	4A1.1(c)	1	27
4/7/11	Aggravated burglary/theft of property over $1,000: 8 years' custody/2 years' custody	4A1.1(a)	3	28
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(a)	3	29
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	1	30
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(a)	1	31
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(a)	3	32
	On parole at the time of the commission of the instant offense	4A1.1(d)	2	34
Criminal history total			**18**	35

And, of course, with 18 criminal history points, Mr. Molina-Martinez fell into Criminal History Category VI, which with a total offense level of 21, produced a

Guideline imprisonment range of 77 to 96 months.

Mr. Molina-Martinez did not object to the PSR's criminal history scoring. The district court ultimately sentenced Mr. Molina-Martinez to 77 months' imprisonment, at the bottom of the Guideline imprisonment range calculated by the PSR.

2. Appeal.

On appeal, Mr. Molina-Martinez argued that the district court had plainly erred in scoring his criminal history under the Guidelines. Particularly, he argued that under the "single sentence" rule of USSG § 4A1.2(a)(2),[1] his Guideline criminal history score should have been calculated as follows (with lined-out text indicating where the district court had erred in its scoring):

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[1] The Sentencing Guidelines provide that prior sentences received on the same day count as but a single sentence, unless they are separated by an intervening arrest:

> If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from the offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also § 4A1.1(e).

USSG § 4A1.2(a)(2).

Date of sentence	**Offense and sentence**	**USSG §**	**Points**	**PSR ¶**
3/6/02	Speeding/no driver's license: 18 days' custody	4A1.2(c)(1)	0	24
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(a)	3	25
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(e)	1	26
1/19/07	Illegal entry into the United States: time served (about 2 days)	4A1.1(c)	1	27
4/7/11	Aggravated burglary/theft of property over $1,000: 8 years' custody/2 years' custody	4A1.1(a)	3	28
4/7/11	Aggravated burglary: 8 years' custody	~~4A1.1(a)~~ 4A1.1(e)	~~3~~ 1	29
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	1	30
4/7/11	Aggravated burglary: 8 years' custody	~~4A1.1(a)~~ 4A1.1(e)	~~1~~ 0	31
4/7/11	Aggravated burglary: 8 years' custody	~~4A1.1(a)~~ 4A1.1(e)	~~3~~ 0	32
	On parole at the time of the commission of the instant offense	4A1.1(d)	2	34
Criminal history total			~~18~~ 12	

With a total of 12 criminal history points, Mr. Molina-Martinez should have been placed in Criminal History Category V, not Criminal History Category VI. Moreover, his

Guideline imprisonment range should have been 70 to 87 months, not the range of 77 to 96 months used by the district court.

Before the Fifth Circuit, the government conceded that the district court had indeed erred as set out above, and that this error was "plain." See Molina-Martinez, 588 Fed. Appx. at 334; see also Gov't C.A. Br. 10, 13-16. The government nevertheless contended that Mr. Molina-Martinez was not entitled to relief because he had not shown an effect on his substantial rights, see Gov't C.A. Br. 10-11, 16-20, and because he had likewise not shown a serious effect on the fairness, integrity, or public reputation of judicial proceedings. See Gov't C.A. Br. 11-12, 21-22.

The Fifth Circuit agreed that Mr. Molina-Martinez "ha[d] shown a plain or obvious error in the criminal history calculation." Molina-Martinez, 588 Fed. Appx. at 334. The Fifth Circuit, however, found that Mr. Molina-Martinez had not shown that the error affected his substantial rights. See id. at 334-35. Because the correct Guideline range (70 to 87 months) overlapped with the incorrect range (77 to 96 months), and because Mr. Molina-Martinez was sentenced within the overlap (to 77 months' imprisonment), the Fifth Circuit applied its rule that Mr. Molina-Martinez had to come forward with "additional evidence" that his substantial rights were affected. See id. at 335. Finding that Mr. Molina-Martinez had not adduced such "additional evidence,"[2] the Fifth Circuit

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[2] Mr. Molina-Martinez argued that there was such "additional evidence" here in that (1) he received the low end of what the district court believed to be the Guideline imprisonment range, notwithstanding the fact that the government asked for the high end; and (2) the parties' arguments

affirmed the judgment of sentence. See id.

Along the way, "Mr. Molina-Martinez preserve[d] for possible further review his contention that an error that alters the Guideline range should be ***presumed*** prejudicial, even where the sentence actually imposed falls within the correct Guideline range." Pet. C.A. Br. 17 n.6 (emphasis in original; citing United States v. Knight, 266 F.3d 203, 207-10 (3d Cir. 2001)). In its opinion, the Fifth Circuit recognized this argument, but noted that it was foreclosed by Fifth Circuit precedent. See Molina-Martinez, 588 Fed. Appx. at 334 n.1.

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respecting the sentence were firmly anchored in the Guideline. See Pet. C.A. Br. 17-18; Pet. C.A. Reply Br. 3-7. The Fifth Circuit, however, rejected that argument. See Molina-Martinez, 588 Fed. Appx. at 335.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

The federal circuits are divided respecting the proper application of the third prong of plain-error review (the "affected substantial rights" prong) to plain errors resulting in the application of the wrong Sentencing Guideline range to a criminal defendant. At least the Third and the Tenth Circuits presume that such errors affected a defendant's substantial rights, whereas at least the Fifth Circuit has declined to adopt such a presumption. Because the application of the third prong of plain-error review to Guideline calculation errors is an important and frequently recurring question in the federal courts of appeals, the Court should grant certiorari in this case to resolve that division.

A. Introduction.

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In United States v. Olano, 507 U.S. 725 (1993), this Court held that, in order to secure relief under plain-error review pursuant to Rule 52(b), a defendant must show that the error affected his substantial rights, which "in most cases [ ] means that the error must have been prejudicial[, i.e.,] [i]t must have affected the outcome of the district court proceedings." Id. at 734 (citations omitted). The Court, however, declined to "decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial,'" id. at 735 (citations omitted); and the Court suggested that "[some] errors [ ] should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice." Id.

Since that time, at least two circuits have, in connection with errors in the

application of the United States Sentencing Guidelines, adopted the very sort of presumption suggested in Olano: that is, they presume an effect on substantial rights when an error results in the application of an erroneous Guideline range to a criminal defendant. See United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014); United States v. Knight, 266 F.3d 203, 207-10 (3d Cir. 2001). In this case, however, the Fifth Circuit rejected such a presumption as foreclosed by its prior decisions.[3] See United States v. Molina-Martinez, 588 Fed. Appx. 333, 334 n.1 (5th Cir. 2014) (unpublished).

As will be demonstrated, compelling reasons support the presumption of prejudice applied by (at least) the Third and the Tenth Circuits in this context. Because the Fifth Circuit has refused to adopt such a presumption, this Court should grant certiorari in this case to resolve this division and, along the way, generally to clarify how the "affected substantial rights" prong of plain-error review should be applied.

B. The reasoning supporting the application of a presumption of prejudice in this context is compelling.

The two principal expositors of the reasons for adopting a presumption of prejudice in this context are the Third Circuit in Knight and the Tenth Circuit in Sabillon-Umana,

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[3] See, e.g., United States v. Regalado-Flores, 236 Fed. Appx. 979, 981 n.1 (5th Cir. 2007) (unpublished) (presumption of prejudice foreclosed by United States v. Wheeler, 322 F.3d 823, 828 n.1 (5th Cir. 2003)); United States v. Sanchez-Medina, 71 Fed. Appx. 395, 395-96 (5th Cir. 2003) (unpublished) (presumption of prejudice foreclosed by Wheeler and United States v. Leonard, 157 F.3d 343, 346 (5th Cir. 1998)).

although each opinion also claims at least implicit support from a number of other circuits. Because those opinions well explain the rationale for adopting such a presumption, each will be discussed in some detail.

1. The Third Circuit's decision in *Knight*.

In Knight, as in this case, the Third Circuit confronted a plain error in the calculation of the defendant's Guidelines Criminal History Category. See Knight, 266 F.3d at 205. As a result, "the correct Guideline range for Knight was 140 to 175 months, rather than the range of 151 to 188 months applied by the District Court." Id. However, the defendant had been sentenced to 162 months of imprisonment, which fell into both the erroneous range and the correct range. See id. The Third Circuit characterized the appeal as "turn[ing] on whether application of an incorrect guideline range resulting in a sentence that is also within the correct range affects substantial rights," and "h[e]ld that it presumptively does." Id. at 207.

The Third Circuit held that errors resulting in an incorrect Guideline sentencing range were among those that should be presumed prejudicial as suggested in Olano, 507 U.S. at 735, because,

> [f]irst, it is beyond cavil that the Guidelines are intended to, and do, affect sentencing. Indeed, that is their very raison d'être. Second, absent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the impact of an erroneous Guidelines range.

Id. at 207 (footnote omitted). For these reasons, the Knight court "conclude[d] that an

error in application of the Guidelines that results in use of a higher sentencing range should be presumed to affect the defendant's substantial rights." Id.

The Third Circuit noted that its rule was "in accord with decisions of several of [its] sister Courts of Appeals, which effectively (albeit not explicitly) apply a similar presumption," id. at 208, and it cited decisions from the First, Second, Fourth, Sixth, Eighth, and Tenth Circuits.[4] See id. at 208-09. Significantly, it considered, but rejected, the less defendant-friendly rule applied by, among others, the Fifth Circuit:

> We believe these cases provide too little protection for the substantial right at issue, and that the rule which we follow today better effectuates the Guidelines' purpose to institute fair and uniform sentencing. A defendant has a right to a sentence that not only falls within a legally permissible range, but that was imposed pursuant to correctly applied law. Because imposition of a sentence selected from the wrong range is likely to impair a defendant's right to a fair sentence, we believe it is appropriate under plain error analysis to remand for sentencing under the correct range notwithstanding a defendant's inability to establish that his separate right to receive a sentence within the applicable guideline range was also impaired.

Id. at 210 (footnotes and citations omitted). See also, e.g., United States v. Syme, 276 F.3d 131, 158 (3d Cir. 2002) (applying rule of Knight).

To be sure, both Knight and Syme were decided under the mandatory Guidelines regime that prevailed before this Court's decision in United States v. Booker, 543 U.S.

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[4] Particularly, the Third Circuit cited: United States v. Plaza-Garcia, 914 F.2d 345, 347-48 (1st Cir. 1990) (Breyer, C.J.); United States v. Martinez-Rios, 143 F.3d 662, 675-76 (2d Cir. 1998); United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1994); United States v. Lavoie, 19 F.3d 1102, 1104 (6th Cir. 1994); United States v. Wallace, 32 F.3d 1171, 1174-75 (7th Cir. 1994); United States v. Robinson, 20 F.3d 270, 273 (7th Cir. 1994); United States v. Weaver, 161 F.3d 528, 530 (8th Cir. 1998); and United States v. Osuna, 189 F.3d 1289, 1295 (10th Cir. 1999).

220 (2005), rendered the Guidelines advisory only. But the Third Circuit has held that "th[e Knight] presumption applies even in the *post*-Booker context." United States v. Porter, 413 Fed. Appx. 526, 530 (3d Cir. 2011) (unpublished) (emphasis in original; citing United States v. Wood, 486 F.3d 781, 790-91 (3d Cir. 2007)). And that makes eminent sense, given the central role that the Guidelines continue to play in federal sentencing even post-Booker. See generally Peugh v. United States, 133 S. Ct. 2072, 2083 (2013).

2. The Tenth Circuit's decision in *Sabillon-Umana*.

In Sabillon-Umana, the Tenth Circuit was likewise confronted with a plain Guideline application error. Writing for that court, Judge Gorsuch (joined by Judge Murphy and D.C. Circuit Judge Sentelle, sitting by designation) explained why the "affected substantial rights" prong of plain-error review was satisfied:

> Both before and after [Booker], this court has recognized that an obvious misapplication of the sentencing guidelines will usually satisfy the third and fourth elements of the plain error test. Other circuits have reached similar conclusions or even adopted an explicit presumption that a clear guidelines error will satisfy the latter two steps of plain error review.[5]
>
> This presumption is sound. If the guidelines form the essential starting point in any federal sentencing analysis (and they do), it follows that an obvious error in applying them "runs the risk of affecting the ultimate sentence ***regardless of*** whether the court ultimately imposes a

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[5] Here, the Tenth Circuit cited: United States v. Vargem, 747 F.3d 724, 728-29 (9th Cir. 2014); United States v. Wernick, 691 F.3d 108, 117-118 (2d Cir. 2012); United States v. Slade, 631 F.3d 185, 191-92 (4th Cir. 2011); United States v. Story, 503 F.3d 436, 440-41 (6th Cir. 2007); United States v. Baretz, 411 F.3d 867, 877 & n.7 (7th Cir. 2005); and Knight, 266 F.3d at 206-07 & n.7 (3d Cir.).

> sentence within or outside [the] range" the guidelines suggests. As the Third Circuit has well said: "[I]t is beyond cavil that the Guidelines are intended to, and do, affect sentencing. Indeed, that is their very raison d'être." In the language of plain error's third prong, the whole point of the guidelines is to affect the defendant's "substantial rights" by guiding the district court's analysis of how much of his liberty he must forfeit to the government. When the court's starting point is skewed a "reasonable probability" exists that its final sentence is skewed too.

Sabillon-Umana, 772 F.3d at 1333 (citations omitted; all alterations in Sabillon-Umana).

After concluding that a presumption should likewise apply with respect to the fourth prong of plain-error review, see id. at 1333-34, the Tenth Circuit concluded that

> [a] presumption that the third and fourth prongs are met by obvious guidelines errors is, thus, sensible and consistent with the terms of those tests, our case law, and the law of other circuits. It has other rule of law virtues too. It provides more certain guidance to the parties than a renewed balancing test in each and every case and it allows more expedition in error correction: knowing that obvious guidelines errors are presumptively subject to correction should enable the parties to agree to their prompt resolution in the district court without the necessity of a lengthy appeal like the one before us.

Id. at 1334 (footnote omitted).

C. The Court should grant certiorari to resolve the circuit split over whether a plain Guideline error that results in the application of an incorrect Guideline range should be presumed to have affected the defendant's substantial rights.

As these decisions highlight, there are compelling reasons to apply a presumption of prejudice to plain errors that result in the application of an incorrect Guideline range to a defendant. First, given the continuing centrality of the Sentencing Guidelines to federal sentencing even post-Booker, there is at least a reasonable probability that

application of an erroneous Guideline range will affect the district court's choice of sentence. See Sabillon-Umana, 772 F.3d at 1333. Indeed, this Court recognized as much in Peugh when it held, for purposes of the Ex Post Facto Clause, that even where sentencing guidelines are advisory, a higher guideline range "create[s] a significant risk that [the defendant] w[ill] receive a higher sentence." Peugh, 133 S. Ct. at 2083 (footnote omitted); see also id. at 2083-84, 2088.

Second, even though the Guidelines are likely to affect a district court's choice of sentence, it is unlikely that a court applying what it thinks is the correct Guideline range will make any comments shedding light on how it might sentence under a ***different, lower*** Guideline range. Indeed, in the Fifth Circuit, where this case arose, district courts have long been admonished that "[w]hen the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation [of the sentence] is required." United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005). But, as the Third Circuit has noted, "absent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the effect of an erroneous Guidelines range." Knight, 266 F.3d at 207. That is why "an error in application of the Guidelines that results in use of a higher sentencing range should be presumed to affect the defendant's substantial rights." Id.

The Fifth Circuit's refusal to adopt the presumption endorsed by the Third and Tenth Circuits had very real consequences for Mr. Molina-Martinez. Given the plain

error resulting in the use of the incorrect Guideline range (77 to 96 months, instead of the correct range of 70 to 87 months), Mr. Molina-Martinez would have been entitled to resentencing in the Third and Tenth Circuits. But, because he could not point to a "fortuitous comment by the sentencing judge on the record," Knight, 266 F.3d at 207 – probably because the district court viewed the sentencing as a rather rote imposition of the bottom of the range that (it believed) the Guidelines recommended – Mr. Molina-Martinez received no redress in the Fifth Circuit for the obvious Guideline calculation error in his case.[6]

In addition to this split of authority, the question of the proper application of the third prong of plain-error review to Guideline application errors is an important question that arises daily in the federal courts of appeals. Moreover, the presumption of prejudice adopted by the Third and Tenth Circuits (and rejected by the Fifth Circuit) arises from a suggestion made by this Court in Olano – a suggestion that the Court has not elaborated upon or elucidated in the more than 20 years since Olano was handed down. The courts of appeals would be benefited in their application of plain-error review generally by this

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[6] Nor is Mr. Molina-Martinez's an isolated case. The Fifth Circuit's jurisprudence is replete with examples of plain Guideline errors where the defendant received no relief on plain-error review, because he could not muster "additional evidence" that the application of the wrong Guideline range affected his sentence. See, e.g., United States v. Sweet, 579 Fed. Appx. 277, 278 (5th Cir. 2014) (unpublished); United States v. Blocker, 612 F.3d 413, 416-17 (5th Cir. 2010); United States v. Del Campo-Ramirez, 379 Fed. Appx. 405, 408-10 (5th Cir. 2010) (unpublished); United States v. Jones, 596 F.3d 273, 277-79 (5th Cir. 2010); cf. United States v. Jasso, 587 F.3d 706, 713-14 (5th Cir. 2009) (alternative holding).

Court's further exploration of that point.[7]

For the foregoing reasons, this Court should grant certiorari in this case.

[7] The proper interpretation and administration of the plain-error rule is unquestionably of exceptional importance to the administration of justice in federal criminal cases. That is why, as the United States stated in a successful attempt to persuade the Court to grant certiorari, "[i]n recent years, this Court frequently has been required to explicate plain-error analysis in criminal cases." Petition for Certiorari, United States v. Marcus, No. 08-1341 (May 1, 2009), at 19 (citations omitted), cert. granted, 558 U.S. 945 (2009), decision below reversed, 560 U.S. 258 (2010).

CONCLUSION

For the foregoing reasons, petitioner Saul Molina-Martinez prays that this Court grant certiorari to review the judgment of the Fifth Circuit in this case.

Date: March 16, 2015

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By _____
TIMOTHY CROOKS
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

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This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.

United States Court of Appeals,
Fifth Circuit.
UNITED STATES of America, Plaintiff–Appellee
v.
Saul MOLINA– MARTINEZ, Defendant–Appellant.

No. 13–40324.
Dec. 17, 2014.

Paula Camille Offenhauser, Assistant U.S. Attorney, Renata Ann Gowie, Assistant U.S. Attorney, Anna Elizabeth Kalluri, Assistant U.S. Attorney, U.S. Attorney's Office, Houston, TX, for Plaintiff–Appellee.

Marjorie A. Meyers, Federal Public Defender, Timothy William Crooks, Assistant Federal Public Defender, Margaret Christina Ling, Assistant Federal Public *334 Defender, Federal Public Defender's Office, Houston, TX, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 1:12–CR–848–1.

Before STEWART, Chief Judge, and JONES and HIGGINSON, Circuit Judges.

PER CURIAM: FN*

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Saul Molina–Martinez pleaded guilty, without the benefit of a plea agreement, to being illegally present in the United States following deportation, having been convicted of an aggravated felony. 8 U.S.C. §§ 1326(a), (b). The district court sentenced Molina–Martinez to 77 months in prison, at the bottom of the 77 to 96 month Sentencing Guidelines range set forth in the presentence report, and to a three-year term of supervised release. For the first time on appeal, Molina–Martinez argues that the district court erred in calculating his criminal history category, and that the correct Guidelines range should have been 70 to 87 months. Because he did not object on this ground in the district court, we review the claim for plain error. *See United States v. Mudekunye,* 646 F.3d 281, 289 (5th Cir.2011). Molina–Martinez must show an error that is clear or obvious and that affects his substantial rights. *See Puckett v. United States,* 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). If he makes such a showing, we have the discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.*

Under the Sentencing Guidelines, prior sentences are counted as a single sentence if they were imposed on the same day, unless the "offenses ... were separated by an intervening arrest (*i.e.,* the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2(a)(2). Molina–Martinez committed four aggravated burglaries in Tennessee in May 2009, and he committed a fifth aggravated burglary and a theft in May 2010. His first arrest for any of these offenses occurred in June 2010. The probation officer imposed a total of nine criminal history points for three of these offenses pursuant to U.S.S.G. § 4A1.1(a) and two additional points for the uncounted offenses under § 4A1.1(e), resulting in a total of 18 criminal history points and a criminal history category of VI. However, because there was no in-

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tervening arrest between the Tennessee burglaries, Molina–Martinez should have received only a total of 12 criminal history points, which results in a criminal history category of V. The correct calculation would have reduced Molina–Martinez's Guidelines range from 77–96 months to 70–87 months. The government concedes this error. Molina–Martinez therefore has shown a plain or obvious error in the criminal history calculation. *See Puckett,* 556 U.S. at 135, 129 S.Ct. 1423.

Molina–Martinez has not, however, established that the error affected his substantial rights. Molina–Martinez must "show a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence." *United States v. Garcia–Carrillo,* 749 F.3d 376, 379 (5th Cir.2014) (internal quotation marks and citation omitted).[FN1] The district court imposed *335 a prison sentence of 77 months, which is at the bottom of the Guidelines range applied by the court and in the middle of the properly calculated range. "[W]hen the correct and incorrect ranges overlap *and the defendant is sentenced within the overlap,* 'we do not assume, in the absence of additional evidence, that the sentence affects a defendant's substantial rights.' " *Mudekunye,* 646 F.3d at 290 (emphasis in original) (quoting *United States v. Blocker,* 612 F.3d 413, 416 (5th Cir.2010)). Thus, because his sentence fell within both the correct and incorrect Guidelines range, Molina–Martinez acknowledges that our controlling caselaw obliges him to point to "additional evidence" in the record, other than the difference in ranges, to show an effect on his substantial rights. *United States v. Pratt,* 728 F.3d 463, 481–82 (5th Cir.2013). Record evidence that the Guidelines range was a "primary factor" in sentencing may be sufficient "additional evidence." *Id.* at 482. In *Pratt,* the district court affirmatively stated on the record that it felt a within-Guidelines sentence was appropriate and that it was choosing a sentence in the middle of the Guidelines range; we noted that this was evidence that the Guidelines range was a primary factor in sentencing. *Id.*[FN2]

FN1. Although Molina–Martinez contends that an error in the Guidelines calculations should be considered presumptively prejudicial, he concedes that the issue is foreclosed by our precedent and raises the argument only to preserve it for further review.

FN2. The court noted also in *Pratt* that there was uncertainty whether an overlap existed at all between the Guidelines range utilized and the correct range. *See Pratt,* 728 F.3d at 482.

Molina–Martinez has not shown additional evidence that the sentence affected his substantial rights. The mere fact that the court sentenced Molina–Martinez to a low-end sentence is insufficient on its own to show that Molina–Martinez would have received a similar low-end sentence had the district court used the correct Guidelines range. *See United States v. Jones,* 596 F.3d 273, 279 (5th Cir.2010). The district court made no explicit statement suggesting that the Guidelines range was a primary factor in sentencing. Neither the parties' anchoring of their sentencing arguments in the Guidelines nor the district court's refusal to grant the government's request for a high-end sentence of 96 months is "additional evidence" that the sentence affected Molina–Martinez's substantial rights. Accordingly, Molina–Martinez has not established plain error warranting reversal by this court. *See Puckett,* 556 U.S. at 135, 129 S.Ct. 1423. The judgment of the district court is AFFIRMED.

C.A.5 (Tex.),2014.
U.S. v. Molina-Martinez
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No. 14-8913

IN THE SUPREME COURT OF THE UNITED STATES

SAUL MOLINA-MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LESLIE R. CALDWELL
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court committed reversible plain error when it sentenced petitioner within an erroneous Sentencing Guidelines range, but petitioner's sentence also fell within the correct range and petitioner identified nothing in the record to establish a reasonable probability that the error affected his sentence.

IN THE SUPREME COURT OF THE UNITED STATES

No. 14-8913

SAUL MOLINA-MARTINEZ, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 20-21) is not published in the Federal Reporter but is reprinted in 588 Fed. Appx. 333.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2014. Pet. App. 20. The petition for a writ of certiorari was filed on March 16, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of being unlawfully present in the United States after having been deported following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). He was sentenced to 77 months of imprisonment. The court of appeals affirmed. Pet. App. 20-21.

1. On August 31, 2012, United States Customs and Border Protection agents located petitioner near Sarita, Texas, as he was attempting to circumvent a border checkpoint. Presentence Investigation Report (PSR) ¶ 4. Petitioner, who is a citizen of Mexico with no legal status in the United States, admitted that he had illegally entered the United States by crossing the Rio Grande River near Hidalgo, Texas, several days earlier. PSR ¶¶ 4-5. A records check revealed that petitioner had been convicted of aggravated burglary in Tennessee in 2002 and 2011 and previously had been deported from the United States to Mexico in 2007 and 2012. PSR ¶ 5.

2. Based on the foregoing, a grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of being found unlawfully present in the United States after having been deported following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). PSR ¶¶ 1-2.

Petitioner pleaded guilty to that offense without a plea agreement. Pet. App. 20; PSR ¶ 3.

a. The Probation Office prepared a PSR that calculated petitioner's base offense level as eight under Sentencing Guidelines § 2L1.2(a) (2012). PSR ¶ 13. The Probation Office recommended a 16-level increase in petitioner's offense level under Section 2L1.2(b)(1)(A)(ii) because petitioner previously had been deported after convictions for aggravated burglary, a felony crime of violence. PSR ¶ 14. With a three-level reduction in offense level for acceptance of responsibility, the Probation Office calculated petitioner's total offense level as 21. PSR ¶¶ 19, 22.

The Probation Office determined that petitioner had 18 criminal history points, which placed him in criminal history category VI. PSR ¶ 35. Four criminal history points were assessed under Sentencing Guidelines § 4A1.1(a) and (e) for two Tennessee aggravated burglary convictions, for which petitioner was sentenced to three years in prison on May 24, 2002. PSR ¶¶ 25-26. One criminal history point was assessed under Section 4A1.1(c) for a federal conviction for entering the United States illegally, for which petitioner was sentenced to time served (approximately two days) on January 19, 2007. PSR ¶ 27. The Probation Office assessed 11 criminal history points under Section 4A1.1 (a) and (e) for five aggravated burglary convictions stemming from burglaries that petitioner committed in May 2009 and May 2010, for which

petitioner was sentenced to eight years in prison on April 7, 2011. PSR ¶¶ 28-32. An additional two points were assessed under Section 4A1.1(d) because, at the time of the instant offense, petitioner was still on parole for the sentences in his 2009 and 2010 burglary cases. PSR ¶ 34.

A total offense level of 21 and a criminal history category of VI resulted in an advisory Sentencing Guidelines range of 77 to 96 months of imprisonment. PSR ¶ 74. The Probation Office also noted that petitioner was subject to a statutory maximum term of 20 years of imprisonment under 8 U.S.C. 1326(a) and (b). PSR ¶ 73.

b. Petitioner objected to the PSR's proposed 16-level enhancement based on his prior aggravated burglary convictions, arguing that the Tennessee convictions did not qualify as crimes of violence under the relevant Sentencing Guidelines definition. C.A. Record on Appeal (ROA) 25, 107-111. Petitioner did not object, however, to the PSR's calculation of his criminal history category. Ibid.

At the sentencing hearing, the district court overruled petitioner's objection to the 16-level enhancement and adopted the PSR's calculation of an advisory range of 77 to 96 months. C.A. ROA 111, 115. The government urged the court to impose "a high end sentence of 96 months" in order "to protect the public from" petitioner, emphasizing that petitioner's multiple burglary convictions had involved "breaking into people's homes," including

while armed. Id. at 111-112. Petitioner responded that he had not used violence during the burglaries and asked the court to impose the 77-month term recommended by the Probation Office. Id. at 113-114. The court sentenced petitioner to 77 months of imprisonment, to be followed by three years of supervised release. Id. at 115.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 20-21. Petitioner argued for the first time on appeal that the district court had erred in calculating his criminal history category. Id. at 20. The court of appeals determined that, because petitioner did not raise that argument before the district court, it was reviewable only for plain error. Ibid. To show plain error, the court explained, petitioner was required to show an "error that is clear or obvious and that affects his substantial rights," and if he made such a showing, the court had "the discretion to correct the error if it seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." Ibid.

The court of appeals first concluded that the district court had made "a plain or obvious error" in calculating petitioner's criminal history when it assessed 11 criminal history points for the five Tennessee aggravated burglary convictions for which petitioner was sentenced on April 7, 2011. Pet. App. 20-21. The court explained that, under the Sentencing Guidelines, prior sentences are counted as a single sentence if they were imposed on

the same day, unless the offenses were separated by an intervening arrest. Id. at 20 (citing Sentencing Guidelines § 4A1.2(a)(2)). Because no arrest intervened between any of the five burglaries, the court concluded that petitioner should have received only five points for the five burglaries, resulting in a total of 12 criminal history points and a criminal history category of V. Id. at 20-21. The correct calculation would have reduced petitioner's advisory Guidelines range from 77 to 96 months to 70 to 87 months. Id. at 21. The government conceded the error. Ibid.

The court of appeals concluded, however, that petitioner had not established that the error affected his substantial rights because he had not shown "a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence." Pet. App. 21 (quoting United States v. Garcia-Carrillo, 749 F.3d 376, 379 (5th Cir.), cert. denied, 135 S. Ct. 676 (2014)). The court observed that petitioner's sentence of 77 months of imprisonment was at the bottom of the advisory Guidelines range that the district court applied and in the middle of the correct Guidelines range. Ibid. Because petitioner's sentence fell within both Guidelines ranges, the court explained that petitioner was obligated "to point to 'additional evidence' in the record, other than the difference in ranges, to show an effect on his substantial rights." Ibid. (quoting United States v. Pratt, 728 F.3d 463, 481-482 (5th Cir.

2013), cert. denied, 134 S. Ct. 1328 (2014)). Because petitioner had not done so, the court concluded that he had not established plain error warranting reversal. Ibid. The court also rejected in a footnote petitioner's alternative argument -- which he had recognized was foreclosed by circuit precedent -- that any error in calculating the Guidelines range presumptively affects a defendant's substantial rights. Id. at 21 n.1.

ARGUMENT

Petitioner contends (Pet. 10-18) that the court of appeals misapplied the plain-error rule by declining to find that the district court's application of the incorrect Guidelines range presumptively affected his substantial rights.[1] The court of appeals' unpublished decision is correct. And although the court's approach to plain-error review is in some tension with decisions of two other courts of appeals, this Court's review is unwarranted at this time, both because the courts of appeals are entitled to take different approaches to reviewing forfeited Guidelines miscalculation claims and because no square conflict exists in cases (such as this one) where the defendant's sentence falls within both the correct and incorrect advisory Guidelines ranges.

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[1] A similar question is presented in De La Torre-De La Torre v. United States, petition for cert. pending, No. 14-9138 (filed Mar. 30, 2015), and Garcia v. United States, petition for cert. pending, No. 14-9154 (filed Mar. 30, 2015).

This Court has previously denied review in several cases raising the question presented, and the same result is appropriate here.[2]

1. The district court applied an advisory Guidelines range of 77 to 96 months of imprisonment and decided to impose a sentence within that range. C.A. ROA 115; PSR ¶ 74. As the court of appeals explained, the correct range was 70 to 87 months of imprisonment, and petitioner's sentence was within that range. Pet. App. 20. The court of appeals correctly concluded that petitioner did not establish any effect on his substantial rights because he failed to demonstrate a reasonable probability that he would obtain a different sentence if he were resentenced using the correct Guidelines range.

a. To obtain relief on a forfeited claim, petitioner must meet the plain-error standard. Fed. R. Crim. P. 52(b). To show reversible plain error, petitioner must demonstrate: (1) that the district court committed an error; (2) that the error was "plain," "clear," or "obvious"; (3) that the error "affect[ed] [his] substantial rights"; and (4) that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993)

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[2] See Sanchez-Brenez v. United States, 132 S. Ct. 1096 (2012) (No. 11-6942); Hudson v. United States, 132 S. Ct. 575 (2011) (No. 11-5325); Pacheco-Garcia v. United States, 132 S. Ct. 451 (2011) (No. 10-9445); Guerrero-Campos v. United States, 132 S. Ct. 451 (2011) (No. 10-9746); Wesevich v. United States, 132 S. Ct. 451 (2011) (No. 10-10340).

(citation omitted). This Court has explained that, "in most cases," the requirement of an effect on substantial rights "means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." Id. at 734. Under the plain-error standard of Rule 52(b), unlike the harmless-error standard of Rule 52(a), "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Ibid. The defendant's burden on plain-error review is to show a reasonable probability that, absent the error, the result of the proceeding would have been different. See, e.g., United States v. Dominguez Benitez, 542 U.S. 74, 81-82 (2004) (adopting the same standard for plain-error cases as for other "cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief," which "requir[es] the showing of 'a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.'" (citation omitted; second set of brackets in original)).

Applying the third prong of plain-error review in this case, the court of appeals correctly held that petitioner had not met his burden of showing that an advisory Guidelines range of 70 to 87 months of imprisonment, rather than a Guidelines range of 77 to 96 months, affected his substantial rights. Pet. App. 21. While the advisory Guidelines range forms the "starting point and the initial benchmark, district [judges] may impose sentences within statutory

limits based on appropriate consideration of all of the factors listed in [18 U.S.C.] 3553(a)." Pepper v. United States, 562 U.S. 476, 490 (2011) (citation omitted). It would be one thing to presume that a reasonable probability exists that a judge might have imposed a different sentence if the judge imposed a within-range sentence, but the correct range does not overlap with the incorrect range that the judge actually applied. In that circumstance, the sentence actually imposed would reflect a departure (or variance) from the correct range when the court had not necessarily disagreed with the Guidelines' advice.[3] Cf. 18 U.S.C. 3553(c)(2) (requiring the court to give a "specific reason" for a non-Guidelines sentence). But it is quite different when the judge has already selected a sentence within the correct range. Under those circumstances, even if the court commits a Guidelines error, the court's sentence accords with the Sentencing Commission's advice because of the overlap between the correct and incorrect ranges. Indeed, the Commission originally designed the Sentencing Table with overlapping ranges in order to "discourage unnecessary litigation." Sentencing Guidelines Ch. 1, Pt. A, intro. cmt. 1, § 4(h), at 11 (2014). "Both prosecution and defense will realize that the difference between one level and another will

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[3] Even then, on plain-error review, reversal is not automatic. See, e.g., United States v. Dickson, 632 F.3d 186, 191 (5th Cir.), cert. denied, 131 S. Ct. 2947 (2011); United States v. Davis, 602 F.3d 643, 649-650 (5th Cir. 2010).

not necessarily make a difference in the sentence that the court imposes." Ibid. That point has added force in an advisory Guidelines regime.

As the court of appeals noted, petitioner's sentence of 77 months fell within both the Guidelines range employed by the district court and the Guidelines range that should have been used absent the incorrect scoring of his criminal history. Pet. App. 21. Petitioner has pointed to nothing in the record suggesting that the lower overlapping range would have changed the ultimate sentence. The court of appeals properly looked to all the facts of this case, not just the error in computing the Guidelines range, and correctly concluded that petitioner had failed to carry his burden of demonstrating "a reasonable probability" that, but for the error in the computation of his advisory Guidelines range, "he "would have received a lesser sentence." Ibid. (citation omitted).[4]

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[4] The court of appeals has concluded in other cases that a sentence at the low end of the advisory Guidelines range may be persuasive, but not dispositive, evidence of a reasonable probability that the district court would have imposed a different sentence had it used a different Guidelines range. See, e.g., United States v. Rodriguez-Gutierrez, 428 F.3d 201, 205 (5th Cir. 2005) ("[S]entences falling at the absolute minimum of the Guidelines provide the strongest support for the argument that the judge would have imposed a lesser sentence. Although we do not hold that this fact alone will establish that the * * * error affected the defendant's substantial rights, we do consider it to be highly probative."), cert. denied, 546 U.S. 1193 (2006); id. at 205-206 ("To clarify, we do not * * * suggest that every sentence imposed at the absolute minimum of the range provided by the

b. Contrary to petitioner's suggestion (Pet. 10, 17), this Court's precedents do not support a presumption that every error in calculating the advisory Guidelines range affects substantial rights. Petitioner relies primarily on Olano, supra, where the Court stated that it "need not decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial,'" or whether there are some "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." 507 U.S. at 735.[5] The Court in Olano, however, declined to presume an effect on substantial rights from the error there -- the presence of alternate jurors in the jury room during deliberations, in violation of Fed. R. Crim. P. 24(c). 507 U.S. at 737. And the Court has not recognized any errors that qualify for such a presumption since Olano.

Guidelines will necessarily compel reversal by this Court."). Even if the court of appeals should have given the bottom-of-Guidelines range sentence here significance as a matter of circuit law -- a fact-bound question that does not warrant further review -- its failure to do so in this unpublished disposition has no effect on circuit precedent.

[5] The Court has also reserved the question, in Olano and subsequent cases, of whether "certain errors, termed 'structural errors,' might 'affec[t] substantial rights' regardless of their actual impact on an appellant's trial." United States v. Marcus, 560 U.S. 258, 263 (2010) (citation omitted); see Puckett v. United States, 556 U.S. 129, 140-141 (2009); Johnson v. United States, 520 U.S. 461, 468-469 (1997); Olano, 507 U.S. at 735. Petitioner does not contend that a Guidelines miscalculation qualifies as structural error.

To the contrary, the Court has repeatedly rejected claims that particular "kind[s] of error[s] would automatically 'affect substantial rights' without a showing of individual prejudice." United States v. Marcus, 560 U.S. 258, 264-265 (2010). The Court in Marcus, for example, rejected a court of appeals rule under which appellants were entitled to relief if there was "'any possibility'" that they had been convicted based on conduct that had not yet been made criminal at the time of their actions. Id. at 263-266 (quoting United States v. Marcus, 538 F.3d 97, 102 (2d Cir. 2008), rev'd, 560 U.S. 258 (2010)); see also United States v. Davila, 133 S. Ct. 2139, 2149 (2013) (rejecting rule of automatic vacatur for violation of Federal Rule of Criminal Procedure barring judicial participation in plea discussions). And in Puckett v United States, 556 U.S. 129 (2009), the Court held that a case-specific showing of prejudice is required for forfeited claims that the government breached a plea agreement, even though that error would trigger automatic reversal on appeal had it been timely raised. Id. at 139-143. The Court explained that it is no more difficult to assess the effect of "plea breaches at sentencing than" to assess the effect of "other procedural errors at sentencing, which are routinely subject to harmlessness review." Id. at 141. The Guidelines-calculation error at issue here is likewise a "procedural error[] at sentencing," ibid., that is

subject to harmless-error analysis. See Williams v. United States, 503 U.S. 193, 203 (1992).

The Court's decision in Peugh v. United States, 133 S. Ct. 2072 (2013) (cited at Pet. 14, 16), also does not support a presumption of prejudice for all Guidelines errors. The Court in Peugh held that the Ex Post Facto Clause is violated when a defendant is sentenced under later-promulgated Sentencing Guidelines that provide for a higher advisory sentencing range than the Guidelines in effect at the time of the offense. Id. at 2079. But the Court recognized that the constitutional sentencing error that it identified was subject to harmless-error analysis and that such errors "may be harmless" when the record makes clear that the sentencing court "would have imposed the same sentence under the older, more lenient Guidelines." Id. at 2088 n.8. That analysis equally supports a case-specific prejudice inquiry when the defendant bears the burden of showing an effect on substantial rights, rather than the government the burden of disproving one.

2. Petitioner claims (Pet. 11-15) that the court of appeals' approach to plain-error review conflicts with decisions of the Third and Tenth Circuits, but petitioner overstates the importance and degree of any conflict.

a. As an initial matter, to the extent that the courts of appeals conduct plain-error analysis differently in cases involving alleged Guidelines errors, this Court has not insisted on rigid

procedural uniformity in appellate review of sentences following its decision rendering the Guidelines advisory in United States v. Booker, 543 U.S. 220 (2005). See Rita v. United States, 551 U.S. 338, 354 (2007) (permitting, but not requiring, courts of appeals to apply "a presumption of reasonableness" to a within-Guidelines-range sentence); cf. Rodriguez v. United States, 545 U.S. 1127 (2005) (No. 04-1148) (denying a writ of certiorari despite the government's suggestion that the Court grant review to resolve a circuit conflict over the proper application of the plain-error standard to forfeited claims of sentencing error under Booker). This Court has not held that any error in calculating a defendant's Guidelines range presumptively affects the defendant's substantial rights for purposes of plain-error review, and the courts of appeals are entitled to take different approaches in dealing with that question.

b. In any event, the approach taken by the decision below does not directly conflict with any decision of another court of appeals. Although two courts of appeals have made statements, in distinguishable contexts, that are in tension with the Fifth Circuit's approach, no square circuit conflict exists at this time, and no further review is warranted.

i. One of the two cases on which petitioner primarily relies (Pet. 12-14), United States v. Knight, 266 F.3d 203 (3d Cir. 2001), was decided while the Guidelines were still mandatory, before this

Court's decision in Booker, supra. That decision did hold that a Guidelines error presumptively affects substantial rights even when the ranges overlap, "unless the record shows that the sentence was unaffected by the error." Knight, 266 F.3d at 207-208; see also United States v. Syme, 276 F.3d 131, 158 (3d Cir.) (cited at Pet. 13) (repeating the statement from Knight that "an error in application of the Guidelines that results in use of a higher sentencing range should be presumed to affect the defendant's substantial rights"), cert. denied, 537 U.S. 1050 (2002). But the question whether a district court would have imposed the same sentence even under a different Guidelines range is quite different now that the Guidelines are advisory. Under advisory Guidelines, the district court has discretion to impose any sentence between the statutory minimum and maximum, not just a sentence within the incorrectly calculated advisory Guidelines range. In deciding on the appropriate sentence, the court takes all of the relevant factors into account, without any presumption in favor of a Guidelines sentence. Gall v. United States, 552 U.S. 38, 50 (2007). That discretion reduces the likelihood that an error in the range has affected the outcome when the sentence imposed lies within the correct range.

Here, for example, the correct Guidelines range was 70 to 87 months; the district court considered sentences within that range because they overlapped with the incorrect range (77 to 96 months).

Nothing about that decision indicates a reasonable likelihood that the court would have selected a different sentence if the court had been aware that the correct advisory Guidelines range included the sentence imposed but also extended seven months lower.

The Third Circuit has not squarely reached the question presented in any post-Booker case governed by the plain-error standard. In a published decision not cited by petitioner, the Third Circuit did state that it adhered to its pre-Booker precedent on prejudice from Guidelines errors, even in advisory Guidelines cases. United States v. Langford, 516 F.3d 205, 216-218 (2008). But Langford was a harmless-error case in which the government, not the defendant, bore the burden of proof. Because there was "nothing in the record to indicate that the District Court would have imposed the same sentence under a lower Guidelines range," and the sentence was "at the low end[point] of the erroneous Guidelines range" actually used, the court held that the government had not carried its burden of showing harmlessness. Id. at 219 & n.5; see id. at 208. The court acknowledged, however, that in examining whether the Guidelines error affected the sentence actually imposed, "[t]he overlap [between the correct and incorrect Guidelines ranges] may be helpful," although "it is the sentencing judge's reasoning, not the overlap alone, that will be determinative." Id. at 216.

Petitioner cites (Pet. 14) an unpublished decision in which the Third Circuit similarly stated that the presumption described in Knight "applies even in the post-Booker context." United States v. Porter, 413 Fed. Appx. 526, 530 (2011).[6] But Porter did not involve a sentence that fell within the defendant's correct advisory Guidelines range. Rather, the defendant's 35-month sentence in that case was above his correct advisory Guidelines range of 27 to 33 months but within the 33 to 41 month range used by the district court. See id. at 529-531. And in deciding to remand, the court of appeals addressed only the government's argument that the defendant could not show an effect on substantial rights because the vacated two-level enhancement was offset by another two-level enhancement that the district court could also have applied. Id. at 530. The court of appeals acknowledged that possibility, and it remanded for the district court to make the necessary findings in the first instance. Id. at 531.

Accordingly, although these two decisions suggest that the Third Circuit might disagree with the Fifth Circuit's application of the substantial-rights prong in this case, the Third Circuit has

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[6] Both Porter and Langford cite United States v. Wood, 486 F.3d 781, 790-791 (3d Cir.), cert. denied, 552 U.S. 855 (2007), a plain-error case that postdated Booker. The Guidelines error there was based on the Ex Post Facto Clause, and it resulted in a three-level enhancement; as a result, the correct and incorrect Guidelines ranges did not overlap. The government conceded that the error affected substantial rights, and the court of appeals did not discuss the issue. Id. at 790.

not squarely addressed that question in a plain-error case like this one, in which the defendant's sentence falls within both the correct and incorrect advisory Guidelines ranges.

ii. For similar reasons, the Tenth Circuit's recent decision in United States v. Sabillon-Umana, 772 F.3d 1328 (2014) (cited at Pet. 14-15), does not create a circuit conflict that warrants review. As relevant here, the court in Sabillon-Umana concluded that the district court had "obviously erred in construing its authority" to depart from the otherwise applicable advisory Guidelines range based on the defendant's substantial assistance to the government, because it believed itself bound by the government's assessment of the degree of sentencing departure warranted by that assistance. Id. at 1334-1335; see Sentencing Guidelines § 5K1.1. Applying plain-error review, the Tenth Circuit construed its pre- and post-Booker decisions to have "recognized that an obvious misapplication of the sentencing guidelines will usually satisfy the third and fourth elements of the plain error test." 772 F.3d at 1333. The court stated that other circuits had "reached similar conclusions or even adopted an explicit presumption that a clear guidelines error will satisfy the latter two steps of plain error review." Ibid.[7] The court then opined

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[7] In support of this statement, the Tenth Circuit cited the Third Circuit's decision in Knight, as well as United States v. Vargem, 747 F.3d 724, 728-729 (9th Cir. 2014); United States v. Wernick, 691 F.3d 108, 117-118 (2d Cir. 2012); United States v. Slade, 631 F.3d 185, 191-192 (4th Cir.), cert. denied, 131 S. Ct.

that "[t]his presumption is sound," reasoning that a Guidelines calculation error "'runs the risk of affecting the ultimate sentence regardless of whether the court ultimately imposes a sentence within or outside [the] range' the guidelines suggest." Ibid. (brackets in original) (quoting United States v. Rosales-Miranda, 755 F.3d 1253, 1259 (10th Cir. 2014)). The court therefore concluded that "[a] presumption that the third and fourth prongs are met by obvious guidelines errors is * * * sensible and consistent with the terms of those tests, our case law, and the law of other circuits." Id. at 1334.

In so concluding, the Tenth Circuit recognized that "presumptions can be overcome and the presumption that obvious guidelines errors meet the latter elements of the plain error test can be too." Sabillon-Umana, 772 F.3d at 1334. But the court found no record evidence in that case, such as a "'fortuitous comment' from the sentencing judge," indicating that the judge's misunderstanding of his departure authority posed no risk of a higher sentence. Id. at 1334-1335 (quoting Knight, 266 F.3d at 207). On the contrary, the court stressed that the judge had initially expressed interest in imposing a sentence as low as 72

2943 (2011); United States v. Story, 503 F.3d 436, 440-441 (6th Cir. 2007); and United States v. Baretz, 411 F.3d 867, 877 & n.7 (7th Cir. 2005). Petitioner does not contend that the latter decisions conflict with the decision of the court of appeals in this case, and with good reason: none of them adopted a presumption of prejudice for all Guidelines errors.

months and had settled on a sentence two years longer "only after the government said that was the lowest guidelines-based sentence the court could accept consistent with its (mistaken) view of § 5K1.1." Id. at 1335.

The presumption adopted in Sabillon-Umana suggests that the Tenth Circuit would disagree with the court of appeals' requirement in this case that petitioner make an individual showing of prejudice at the third step of the plain-error analysis. But like the Third Circuit decisions discussed above, Sabillon-Umana itself did not involve overlapping Guidelines ranges.[8] The Tenth Circuit has thus had no occasion to address how its presumption would apply in a case like petitioner's, where the sentence imposed falls within both the correct advisory Guidelines range and the incorrect range used by the district court. And because the court of appeals made clear that its presumption is rebuttable, it would be premature to conclude that the two circuits' approaches will

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[8] In a decision quoted in Sabillon-Umana, 772 F.3d at 1333, the Tenth Circuit cited with approval a pre-Booker decision holding that a sentencing error satisfied the third prong of the plain-error test even though the defendant's sentence fell within the correct Guidelines range. See Rosales-Miranda, 755 F.3d at 1261 (discussing United States v. Osuna, 189 F.3d 1289 (10th Cir. 1999)). But Rosales-Miranda itself did not involve overlapping ranges; the error there "more than doubled" the advisory Guidelines range. Id. at 1260. And the court discussed its earlier decisions in the course of rejecting an argument that defendants "should be deemed as a matter of law not to have been prejudiced" when their sentence falls within the correct advisory range. Id. at 1261.

necessarily lead to different results in overlapping-range cases such as this one. Accordingly, even if this Court's precedents required a uniform approach to plain-error review of Guidelines misapplication claims, see pp. 14-15, supra, the Court's intervention would be premature at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LESLIE R. CALDWELL
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

JUNE 2015

NO. 14-8913

IN THE SUPREME COURT OF THE UNITED STATES

SAUL MOLINA-MARTINEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

TIMOTHY CROOKS
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, TX 77002-1669
Telephone: (713) 718-4600

QUESTION PRESENTED

In United States v. Olano, 507 U.S. 725 (1993), the Court held that, in order to secure relief under plain-error review pursuant to Federal Rule of Criminal Procedure 52(b), a defendant must show that the error affected his substantial rights, which "in most cases [ ] means that the error must have been prejudicial[, i.e.,] [i]t must have affected the outcome of the district court proceedings." Id. at 734 (citations omitted). The Court, however, declined to "decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial,'" id. at 735 (citations omitted); and the Court suggested that "[some] errors [ ] should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice." Id.

Since that time, at least two circuits have, in connection with errors in the application of the United States Sentencing Guidelines, adopted the very sort of presumption suggested in Olano: that is, they presume an effect on substantial rights when an error results in the application of an erroneous Guideline range to a criminal defendant. See United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014); United States v. Knight, 266 F.3d 203, 207-10 (3d Cir. 2001). In this case, however, the Fifth Circuit rejected such a presumption as foreclosed by its prior decisions. See United States v. Molina-Martinez, 588 Fed. Appx. 333, 334 n.1 (5th Cir. 2014) (unpublished).

In light of the foregoing, the question presented is as follows:

> Where an error in the application of the United States Sentencing Guidelines results in the application of the wrong Guideline range to a criminal defendant, should an appellate court presume, for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b), that the error affected the defendant's substantial rights?

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PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

The federal circuits are divided respecting the proper application of the third prong of plain-error review (the "affected substantial rights" prong) to plain errors resulting in the application of the wrong Sentencing Guideline range to a criminal defendant. At least the Third and the Tenth Circuits presume that such errors affected a defendant's substantial rights, whereas at least the Fifth Circuit has declined to adopt such a presumption. Because the application of the third prong of plain-error review to Guideline calculation errors is an important and frequently recurring question in the federal courts of appeals, the Court should grant certiorari in this case to resolve that division.

1. Grudgingly acknowledging that "the [Fifth Circuit's] approach to plain-error review [of Guideline application errors] is in some tension with decisions of two other courts of appeals," Br. Opp. 7, the government nevertheless argues that "this Court's review is unwarranted at this time," Br. Opp. 7, for two reasons. First, the government argues that "the courts of appeals are entitled to take different approaches to reviewing forfeited Guidelines miscalculation claims." Br. Opp. 7. Second, the government argues that "no square conflict exists in cases (such as this one) where the defendant's sentence falls within both the correct and the incorrect advisory Guidelines range." Br. Opp. 7 Neither one of these arguments is persuasive.

2. With respect to its first argument, the government asserts that "this Court has not insisted on rigid procedural uniformity in appellate review of sentences following its decision rendering the Guidelines advisory in United States v. Booker, 543 U.S. 220

(2005)," Br. Opp. 14-15; but the only example it can produce in support of this statement is this Court's decision in Rita v. United States, 551 U.S. 338, 354 (2007), in which this Court permitted, but did not require, courts of appeals to apply a presumption of reasonableness when reviewing the substantive reasonableness of within-Guidelines sentences.[1] See Br. Opp. 14. Based upon this lone example, the government concludes that "[t]his Court has not held that any error in calculating a defendant's Guidelines range presumptively affects the defendant's substantial rights for purposes of plain-error review, and the courts of appeals are entitled to take different approaches in dealing with that question." Br. Opp. 15.

The first half of that sentence is unquestionable: this Court has ***not*** held that a Guideline application error resulting in the application of an erroneous Guideline range presumptively affects a defendant's substantial rights. That is the point of this petition – to ask the Court to do so. And, the second half of that sentence is just flat wrong. Courts of appeals are ***not*** entitled to apply Federal Rule of Criminal Procedure 52(b) in disparate ways, which is why this Court has, over the past two decades, repeatedly granted certiorari to address circuit splits in the interpretation and application of Rule 52(b).

Interestingly, not that many years ago, the government was confronted with – and

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[1] The government also cites, with a "cf." signal, a denial of certiorari by this Court in another case, see Br. Opp. 15, but, of course, it is well known that a denial of certiorari does not reflect any view on the merits of the question presented. Additionally, in that case, the circuit split presented by the petition was an ephemeral one, applicable only to cases "in the pipeline" when Booker was decided.

disputed – the very sort of argument it now makes here. In United States v. Marcus, No. 08-1341, the government as petitioner argued that the Second Circuit had misapplied the affected-substantial-rights prong of plain-error review under Rule 52(b). In his brief in opposition, the respondent "assert[ed] that 'a uniform national rule [was] not required for this procedural issue,' and that the Second Circuit 'did not abuse its discretion' in granting relief in th[at] case." Reply Brief for the United States, United States v. Marcus, No. 08-1341, 2009 WL 4875823, at *4 (Jul. 15, 2009) (citations omitted). The government adamantly disagreed: it argued that "Congress and this Court have determined that a uniform rule is warranted by promulgating Federal Rule of Criminal Procedure 52(b), which, like the rest of the Criminal Rules, 'govern[s] the proceedings in ***all*** criminal proceedings in . . . the United States courts of appeals.'" Id. (citation and footnote omitted; emphasis added in government's brief).

Along the way, the government distinguished Ortega-Rodriguez v. United States, 507 U.S. 234 (1993), which the respondent had cited as an example of courts of appeals' being given discretion to craft their own procedural rules. Ortega-Rodriguez, said the government, "involved an issue . . . that was not directly addressed by a statute or federal rule." Id. at *4 n.2. But that distinction applies with equal force to the rule in Rita relied upon by the government in this case. Rita simply allowed the courts of appeals some leeway in the reasonableness review crafted by this Court in Booker – a review that likewise "was not directly addressed by a statute or federal rule."

In short, the government has provided no authority, nor any good reason, why courts of appeals should be allowed to apply Rule 52(b) in drastically different ways. Rather, the fact that the courts of appeals are doing so is a traditional and appropriate reason for this Court to exercise its certiorari jurisdiction.

3. The government next argues that "[a]lthough two courts of appeals have made statements, in distinguishable contexts, that are in tension with the Fifth Circuit's approach, no square circuit conflict exists at this time, and no further review is warranted." Br. Opp. 15. The government then proceeds to analyze and distinguish the Third and Tenth Circuit decisions that petitioner argued were directly in conflict with the Fifth Circuit's decision in this case. See Br. Opp. 15-22.

The government's attempts to distinguish the Third and Tenth Circuit decisions relied upon by petitioner are unavailing. With respect to the Third Circuit's decision in United States v. Knight, 266 F.3d 203 (3d Cir. 2001), the government relies heavily on the fact that it was decided when the Guidelines were mandatory, not advisory. See Br. Opp. 15-17. But petitioner explained in his petition why that fact makes no difference and why the question presented here remains an important one, due to the continuing centrality of the Sentencing Guidelines in federal sentencing. See Pet. Cert. 13-14, 15-16.

The government also argues that "[t]he Third Circuit has not squarely reached the question presented in any post-Booker case governed by the plain-error standard." Br. Opp. 17. That is not correct: the Third Circuit has at least twice since Booker held that

where a Guideline application error results in the application of an erroneous Guideline range to the defendant, it will presume an effect on the defendant's substantial rights.[2] See United States v. Porter, 413 Fed. Appx. 526, 530 (3d Cir. 2011) (unpublished); United States v. Wood, 486 F.3d 781, 790-91 (3d Cir. 2007).

But the government's error appears to proceed from its misunderstanding of petitioner's argument. Petitioner is not arguing for a presumption of prejudice only when a defendant's sentence falls within the overlap between the correct Guideline range and the incorrect range applied by the sentencing court (although that is the factual scenario presented by petitioner's case). Rather, petitioner is arguing for such a presumption ***whenever*** a defendant is sentenced under the incorrect Guideline range.

The government's erroneous understanding of petitioner's argument likewise taints the government's discussion of the Tenth Circuit's decision in United States v. Sabillon-Umana, 772 F.3d 1328 (10th Cir. 2014), which the government again distinguishes primarily on the ground that it "did not involve overlapping Guidelines ranges." Br. Opp. 21 (footnote omitted). Again, however, petitioner's argument is not limited merely to the scenario of overlapping Guideline ranges. More importantly, nothing in the Third and

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[2] The government's error appears to proceed from its misunderstanding of petitioner's argument. Petitioner is not arguing for a presumption of prejudice only when a defendant's sentence falls within the overlap between the correct Guideline range and the incorrect range applied by the sentencing court (although that was the factual scenario presented by petitioner's case). Rather, petitioner is arguing for such a presumption ***whenever*** a defendant is sentenced under the incorrect Guideline range.

Tenth Circuit's decisions suggests that their presumptions of prejudice would not apply to overlapping Guideline ranges. To the contrary, those courts presume (subject to rebuttal) an effect on substantial rights ***whenever*** a defendant is sentenced under an incorrect Guideline range.

5. In sum, this petition raises an important question respecting the application of the plain-error doctrine of Rule 52(b) in the context of errors in the Sentencing Guidelines, and the Fifth Circuit's answer to that question is in direct conflict with the answer given by the Third and Tenth Circuits. Moreover, the question is a frequently recurring one, as demonstrated by the government's (presumably incomplete) list of petitions in which the question has been raised, see Br. Opp. 8 n.2, as well as the fact that there are two other currently pending petitions raising the same question. See Br. Opp. 7 n.1. Accordingly, this Court should not stay its hand any further, but rather should grant certiorari to resolve this question.

CONCLUSION

For the foregoing reasons, as well as those set forth in the original petition for writ of certiorari, petitioner Saul Molina-Martinez prays that this Court grant certiorari to review the judgment of the Fifth Circuit in this case.

Date: June 11, 2015

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By _____
TIMOTHY CROOKS
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, TX 77002-1669
Telephone: (713) 718-4600

No. 14-8913

In The
Supreme Court of the United States

SAUL MOLINA-MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

MARJORIE A. MEYERS
Federal Public Defender
SOUTHERN DISTRICT OF TEXAS
TIMOTHY CROOKS*
LAURA FLETCHER LEAVITT
Assistant Federal Public Defenders
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
(713) 718-4600
tim_crooks@fd.org
Counsel for Petitioner
**Counsel of Record*

DONALD B. VERRILLI, JR.*
Solicitor General
UNITED STATES DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue N.W.
Room 5614
Washington, DC 20530-0001
(202) 514-2217
SupremeCtBriefs@usdoj.gov
Counsel for Respondent

Petition For Certiorari Filed March 16, 2015
Certiorari Granted October 1, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,	Criminal Case No. 1:12-00848
v.	Relevant Docket Entries
SAUL MOLINA-MARTINEZ, Defendant.	

Date filed	No.	Docket Text
09/01/2012	1	COMPLAINT as to Saul Molina-Martinez (1), filed. (bcampos,) (avleal,). [1:12-mj-00867] (Entered: 09/04/2012)
09/01/2012	2	AO 257 Information Sheet as to Saul Molina-Martinez; arrested on 8/31/12, filed.(bcampos,) (rnieto,). (Additional attachment(s) added on 9/4/2012: # 1 Unredacted attachment) (rnieto). [1:12-mj-00867] (Entered: 09/04/2012)
09/04/2012	3	ORDER APPOINTING FEDERAL PUBLIC DEFENDER as to Saul Molina-Martinez (Signed by Magistrate Judge Ronald G. Morgan) Parties notified. (sbejarano,) [1:12-mj-00867] (Entered: 09/04/2012)
09/25/2012	6	INDICTMENT (The original indictment with the signature of the grand jury foreperson is on file under seal with

	the clerk) as to Saul Molina-Martinez (1) count(s) 1, filed. (sbejaranoadi,) [*sic*] Modified on 9/27/2012 (sbejarano,). (Entered: 09/26/2012).
10/03/2012	Minute Entry for proceedings held before Magistrate Judge Ronald G. Morgan: ARRAIGNMENT as to Saul Molina-Martinez held on 10/3/2012. Deft waives reading of the Indictment and enters a Plea of NOT GUILTY. Scheduling Order dates orally given to all parties. Guilty Plea scheduled. Deft remanded to the custody of the U.S. Marshal. Appearances: David Lindenmuth standing in for Bill Hagen, AUSA; Reynaldo Cantu f/dft. (USPO: Celia Arrezola) (ERO: Juanita Tabares) (Interpreter: Sandra Cortez) (DUSM: Matthew Lesche) (bvasquez) [9:21-9:31 AM] (Entered: 10/03/2012)
10/11/2012	Minute Entry for proceedings held before Magistrate Judge Felix Recio: RE-ARRAIGNMENT held on 10/11/2012; Pursuant to General Order 05-001/002, Plea as to Saul Molina-Martinez (1) Guilty Count 1 before a United States Magistrate Judge; Consent to Administration of Guilty Plea and Fed.R.Crim.P. 11 Allocution by United States Magistrate Judge filed; Defendant placed under oath. The Court was informed that the defendant was offered a Plea Agreement and after discussions with the defendant, the plea agreement

		was rejected. The Court inquires if the defendant has been advised of the possible immigration consequences resulting from this plea, pursuant to Padilla v. Kentucky, 130 S.Ct.1473 (2010); Defendant enters a PLEA OF GUILTY to the Indictment; NO PLEA AGREEMENT filed; PSI and Sentencing dates orally given to all parties; Terminate other settings and motion for this defendant. Sentencing set for 1/14/2013 at 08:30 AM before Judge Andrew S. Hanen. Defendant remanded to the custody of the US Marshal. Appearances: AUSA A Cano and R Cantu f/dft,. US Probation – B, US Marshal – B. (ERO: D Ahumada) (Interpreter: V Reyes) (sgarcia,) (09:13-09:53am) (Entered: 10/11/2012)
10/11/2012	12	ORDER for Presentence Investigation and Disclosure & Sentencing Dates as to Saul Molina-Martinez. PSI Completion due by 11/26/2012 Objection to PSI due by 12/10/2012 Final PSI due by 12/24/2012 Sentencing set for 1/14/2013 at 08:30 AM in Courtroom 6 before Judge Andrew S. Hanen (Signed by Magistrate Judge Felix Recio) Parties notified. (bcampos,) (Entered: 10/11/2012)
12/07/2012	14	NOTICE of No Objections of the United States to the PSR by USA as to Saul Molina-Martinez, filed. (Hagen, William) (Entered: 12/07/2012)

12/19/2012	15	OBJECTION by Saul Molina-Martinez *to the PSR*, filed. (Attachments: # 1 Proposed Order) (Cantu, Reynaldo) (Entered: 12/19/2012)
12/20/2012	16	Final Presentence Investigation Report (Sealed) as to Saul Molina-Martinez, filed. (Attachments: # 1 attpsr1, # 2 attpsr2) (msosa,) (Entered: 12/20/2012)
12/20/2012	17	Confidential Sentencing Recommendation (Sealed) regarding Saul Molina-Martinez, filed. (msosa,) (Entered: 12/20/2012)
12/20/2012	18	Sealed Addendum to 16 Final Presentence Investigation Report (Sealed) as to Saul Molina-Martinez, filed. (msosa,) (Entered: 12/20/2012)
01/14/2013		Minute Entry for proceedings held before Judge Andrew S. Hanen: Appearances: B.Hagen, AUSA; R.Cantu, AFPD f/deft; S. Barrios, USPO (Duty); (Court Reporter: Barbara Barnard); (Interpreter: S.Cortez)(08:37-08:39) SENTENCING HELD in PART on 1/14/2013 as to Saul Molina-Martinez. Deft sworn in. No objection from Govt/Deft to report &recommendation, Court accepts Magistrate's plea and adjudicates Deft Guilty. Defts ORAL motion for continuance w/o objections-GRANTED. Sentencing continued to 03/04/13 at 8:30 am. Deft remanded to the custody of USM., filed. (csustaeta,) (Entered: 01/14/2013)

03/04/2013	Minute Entry for proceedings held before Judge Andrew S. Hanen: Appearances: B. Hagen, AUSA; R. Cantu, AFPD f/deft; M. Garcia, USPO (duty); (Court Reporter: Barbara Barnard); (Interpreter: K. Pena) (10:19-10:21) SENTENCING HELD in PART on 3/4/2013 as to Saul Molina-Martinez. Defts oral motion for continuance w/o objections-GRANTED. Sentencing continued to 03/14/13 at 8:30 am. Deft remanded to the custody of USM., filed. (csustaeta,) (Entered: 03/04/2013)
03/14/2013	Minute Entry for proceedings held before Judge Andrew S. Hanen: Appearances: B. Hagen, AUSA; R. Cantu, AFPD f/deft; S. Espinosa, USO (duty); (Court Reporter: Barbara Barnard); (Interpreter: S.Cortez) (09:25-09:41) SENTENCING held on 3/14/2013 as to Saul Molina-Martinez. (P/G to Ct.1 on 10/11/12) Deft sworn in. 15 Defts objections-OVERRULED. Govts Exhibit #1 admitted. Court adopts PSI findings. SENTENCE: Saul Molina-Martinez (1), Count(s) 1, CBOP: 77 months; SRT: 3 yrs w/o supervision; SA: $100 remitted, Fine waived. Deft shall cooperate in collection of DNA sample. Deft not to re-enter U. S. Illegally. Deft remanded to the custody of USM., filed. (csustaeta,) (Entered: 03/14/2013)

03/18/2013	22	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit by Saul Molina-Martinez, filed. (Cantu, Reynaldo) (Entered: 03/18/2013)
03/22/2013	26	JUDGMENT as to Saul Molina-Martinez (Signed by Judge Andrew S. Hanen) Parties notified. (dnoriega,) (Entered: 03/22/2013)
03/22/2013	27	Statement of Reasons (Sealed) as to Saul Molina-Martinez, filed. (Entered: 03/22/2013)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	5th Cir. No. 13-40324
v.	D.C. No. No. 1:12-CR-848-1
SAUL MOLINA-MARTINEZ, Defendant-Appellant.	Relevant Docket Entries

Date	Docket Text
03/21/2013	DIRECT CRIMINAL CASE docketed. NOA filed by Appellant Mr. Saul Molina-Martinez [13-40324] (BCL)
08/01/2013	ANDERS BRIEF DECLARED MOOT AS A MERITS BRIEF HAS BEEN FILED.
	ANDERS BRIEF FILED by Mr. Saul Molina-Martinez. Date of service: 08/01/2013 via email – Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellee: Gowie [13-40324] REVIEWED AND/OR EDITED. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Paper Copies of Brief due on 08/12/2013 for Appellant Saul Molina-Martinez. [13-40324] (Timothy William Crooks)
08/01/2013	MOTION filed by Attorney Mr. Timothy William Crooks for Appellant Mr. Saul Molina-Martinez *in accordance with Anders v. California 386 U.S. 738 (1967)* to withdraw as counsel [7425447-2]. Date

of Service: 08/01/2013 via email – Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellee: Gowie [13-40324] (Timothy William Crooks)

09/25/2013 PRO SE RESPONSE filed by Appellant Mr. Saul Molina-Martinez to the motion to withdraw as counsel filed by Mr. Timothy William Crooks in 13-40324 [7425447-2] Anders Response deadline satisfied.. Date of Service: 09/19/2013 [13-40324] (AS)

01/14/2014 COURT ORDER denying motion to withdraw as counsel filed by Mr. Timothy William Crooks, directing counsel to file a supplemental Anders brief or a brief on the merits addressing whether the criminal history category was accurately calculated and any other non-frivolous matters (IN DETAIL) [7425447-2] A/Pet's Brief due on 02/13/2014 for Appellant Saul Molina-Martinez. Judge(s): CH. [13-40324] (ADB)

01/31/2014 APPELLANT'S BRIEF FILED by Mr. Saul Molina-Martinez. Date of service: 01/31/2014 via email -Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellee: Gowie [13-40324] REVIEWED AND/OR EDITED. # of Copies Provided: 0. A/Pet's Brief deadline satisfied. Appellee's Brief due on 03/05/2014 for Appellee United States of America. Paper Copies of Brief due on 02/10/2014 for Appellant Saul Molina-Martinez [13-40324] (Timothy William Crooks)

04/28/2014 APPELLEE'S BRIEF FILED by Appellee USA. Date of service: 04/28/2014 via email – Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellees: Gowie, Offenhauser [13-40324] REVIEWED AND/OR EDITED. # of Copies Provided: 0. E/Res's Brief deadline satisfied. Reply Brief due on 05/15/2014 for Appellant Saul Molina-Martinez. Paper Copies of Brief due on 05/05/2014 for Appellee United States of America. [13-40324] (Paula Camille Offenhauser)

05/09/2014 APPELLANT'S REPLY BRIEF FILED by Mr. Saul Molina-Martinez Date of service: 05/09/2014 via email - Attorney for Appellants: Crooks, Meyers; Attorney for Appellees: Gowie, Offenhauser [13-40324] REVIEW AND/OR EDITED.

# of Copies Provided: 0. Reply Brief deadline satisfied. Paper Copies of Brief due deadline satisfied. [13-40324] (CAG) (Timothy William Crooks)

10/23/2014 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA Date of Service: 10/23/2014 via email – Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellees: Gowie, Kalluri, Offenhauser [13-40324] (Anna Elizabeth Kalluri)

10/27/2014 ORAL ARGUMENT HEARD before Judges Stewart, Jones, Higginson. Arguing Person Information Updated for: Timothy William Crooks arguing for Appellant Saul Molina-Martinez; Arguing Person

Information Updated for: Anna Elizabeth Kalluri arguing for Appellee United States of America [13-40324] (SME)

11/04/2014 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellee USA Date of Service: 11/04/2014 via email – Attorney for Appellants: Crooks, Ling, Meyers; Attorney for Appellees: Gowie, Kalluri, Offenhauser [13-40324] (Anna Elizabeth Kalluri)

11/04/2014 RESPONSE filed by Appellant Mr. Saul Molina-Martinez to the 28j letter filed by Appellee USA in 13-40324 [7769122-2] Date of Service: 11/04/2014 via email – Attorney for Appellants: Crooks, Meyers; Attorney for Appellees: Gowie, Kalluri, Offenhauser [13-40324] (Timothy William Crooks)

11/06/2014 SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellant Mr. Saul Molina-Martinez Date of Service: 11/06/2014 via email – Attorney for Appellants: Crooks, Meyers; Attorney for Appellees: Gowie, Kalluri, Offenhauser [13-40324] (Timothy William Crooks)

12/17/2014 UNPUBLISHED OPINION FILED. [13-40324 Affirmed] Judge: CES , Judge: EHJ , Judge: SAH Mandate pull date is 01/07/2015 for Appellant Saul Molina-Martinez [13-40324] (RMF)

12/17/2014 JUDGMENT ENTERED AND FILED. [13-40324] (RMF)

01/08/2015 MANDATE ISSUED. Mandate pull date satisfied. [13-40324] (CAG)

03/20/2015 SUPREME COURT NOTICE that petition for writ of certiorari [7869127-2] was filed by Appellant Mr. Saul Molina-Martinez on 03/16/2015. Supreme Court Number: 14-8913. [13-40324] (LGL)

10/02/2015 SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Saul Molina-Martinez in 13-40324 on 10/01/2015. [8026075-1] [13-40324](CAV)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
	§	**CRIMINAL NO.**
vs	§	**B-12-848**
SAUL MOLINA-MARTINEZ	§	

INDICTMENT

(Filed Sep. 25, 2012)

THE GRAND JURY CHARGES:

On or about August 31, 2012, in the Southern District of Texas and within the jurisdiction of the Court, Defendant,

SAUL MOLINA-MARTINEZ,

an alien who had previously been denied admission, excluded, deported, and removed, after having been convicted of an aggravated felony, knowingly and unlawfully was present in the United States having been found in Kenedy County, Texas, the said defendant having not obtained consent to reapply for admission into the United States from the Attorney General of the United States and Secretary of Homeland Security, the successor, pursuant to Title 6, United States Code, Sections 202(3), 202(4), and 557

In violation of Title 8, United States Code, Section 1326(a) and 1326(b).

A TRUE BILL:

_____

FOREPERSON OF
THE GRAND JURY

KENNETH MAGIDSON
UNITED STATES ATTORNEY

/s/ Bill Hagen
William Hagen
Assistant United
States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
	§	Criminal No.
vs	§	B-12-848-1
SAUL MOLINA-MARTINEZ	§	

NO OBJECTIONS OF THE UNITED STATES TO PRESENTENCE REPORT

(Filed Dec. 7, 2012)

COMES NOW the United States Attorney for the Southern District of Texas by and through its Assistant United States Attorney and files, pursuant to Federal Sentencing Guidelines Section 6A1.3, no objections to the Presentence Report.

Respectfully submitted,

KENNETH MAGIDSON
UNITED STATES ATTORNEY

s/ William F. Hagen

WILLIAM F. HAGEN
Assistant United
States Attorney
Fed. Bar No. 28261
TX Bar No. 08688600
600 E. Harrison St, #201
Brownsville, TX 78520
Tel: (956) 548-2554;
Fax: (956) 548-2711

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of December, 2012, the No Objections of the United States to Presentence Report was electronically filed. A copy will be electronically sent to Reynaldo Cantu, Assistant Federal Public Defender, Brownsville, Texas. The original was hand delivered to the U.S. Probation Office, Brownsville, Texas.

s/ William F. Hagen
WILLIAM F. HAGEN
Assistant United
States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
	§	CR. NO. B-12-848
V	§	
SAUL MOLINA-MARTINEZ	§	

DEFENDANT'S OBJECTION TO THE PRESENTENCE INVESTIGATION REPORT

(Filed Dec. 19, 2012)

Comes now, **SAUL MOLINA-MARTINEZ**, defendant, and makes the following objection to the Presentence Investigation Report (PSR) as follows:

I.

Defendant objects to the 16 level enhancement in paragraph14. The Tennessee statutes section 39-14-401, 402 and 403 definitions are broader than the Model Penal Code, *US v. Herrera-Montes*, 490 F3d 390 (5thCir 2007).

WHEREFORE PREMISES CONSIDERED, defendant prays the Court to sustain this objection to the presentence investigation report.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas.
Texas State Bar No. 14003750
Southern District of
Texas No. 3233

By: /s/ Reynaldo S. Cantu
REYNALDO S. CANTU
Assistant Federal
Public Defender
Attorney in Charge
Texas State Bar No. 03767500
Southern District of
Texas No. 1900
600 E. Harrison Street, #102
Brownsville, Texas 78520
Telephone: (956) 548-2573
Fax: (956) 548-2674

CERTIFICATE OF SERVICE

I, Reynaldo S. Cantu, certify that on 19 day of December, 2012, a copy of the foregoing **Defendant's Objection to the Presentence Investigation Report** was served by Notification of Electronic Filing to the office of United States Probation Officer Samantha Espinosa, 600 E. Harrison Street, #103,

Brownsville, Texas 78520, and was served by Notification of Electronic Filing to Assistant United States Attorney William F. Hagen, 600 E. Harrison Street, #201, Brownsville, Texas 78520.

/s/ Reynaldo S. Cantu
REYNALDO S. CANTU
Assistant Federal
Public Defender

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with Assistant United States Attorney William F. Hagen concerning this objection, and he informed me that the government is opposed to said objection.

/s/ Reynaldo S. Cantu
REYNALDO S. CANTU
Assistant Federal
Public Defender

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA VS. SAUL MOLINA-MARTINEZ	CRIMINAL ACTION NO. B-12-848

CALL FOR SENTENCING
BEFORE THE HONORABLE ANDREW S. HANEN
JANUARY 14, 2013
VOLUME 1

APPEARANCES:

For the Plaintiff:
MR. WILLIAM HAGEN
Assistant United States Attorney
Brownsville, Texas

For the Defendant:
MR. REYNALDO CANTU
Assistant U.S. Public Defender
Brownsville, Texas

THIS TRANSCRIPT HAS BEEN FURNISHED AT PUBLIC EXPENSE UNDER THE CRIMINAL JUSTICE ACT AND MAY BE USED ONLY AS AUTHORIZED BY COURT ORDER. UNAUTHORIZED REPRODUCTION WILL RESULT IN AN ASSESSMENT AGAINST COUNSEL FOR THE COST OF AN ORIGINAL AND ONE COPY AT THE OFFICIAL RATE.

General Order 94-15, United States District Court, Southern District of Texas.

Transcribed by:
BARBARA BARNARD
Official Court Reporter
600 E. Harrison, Box 301
Brownsville, Texas 78520
(956) 548-2591

[2] THE COURT: B-12-848, United States of America versus Saul Molina-Martinez.

MR. HAGEN: Bill Hagen for the government. We're ready, Your Honor.

MR. CANTU: Reynaldo Cantu for the defendant.

(Defendant present.)

THE COURT: All right. Where are we, Mr. Cantu?

MR. CANTU: May it please the Court, there's an issue in regard to the underlying burglary of a habitation on this case that I'm just not satisfied with what I've done so far. I'd like 30 days so that I can continue in regard to being able to present something to the Court.

MR. HAGEN: No objection.

THE COURT: All right. Mr. Molina, do you have any objection to me postponing this?

THE DEFENDANT: I'm sorry?

THE COURT: He can't hear.

THE INTERPRETER: It's too loud.

THE COURT: Can you hear now? There's a squeak. I can hear it.

THE DEFENDANT: No.

THE COURT: All right. Is there any reason I can't go ahead and adopt the report and recommendation?

MR. CANTU: No, Your Honor.

MR. HAGEN: No objection.

[3] *(Defendant sworn.)*

THE COURT: All right. Counsel, Mr. Molina pled guilty to Judge Recio. Is there any objection to me adopting that report and recommendation?

MR. HAGEN: No objection, Your Honor.

MR. CANTU: No objection, Your Honor.

THE COURT: Mr. Molina, when you pled guilty, you pled guilty to one of our United States magistrate judges. He's recommended to me that I should accept your guilty plea. Is there any reason why I shouldn't?

THE DEFENDANT: Yes.

MR. CANTU: May I, Your Honor?

THE COURT: Okay.

(Discussion off the record.)

THE COURT: All right. Let me ask the question again.

THE DEFENDANT: Yes.

THE COURT: All right. Mr. Molina, you pled guilty to a different judge. And is there any objection to me adopting that report and recommendation that recommends me to accept the guilty plea?

THE DEFENDANT: No, no problem.

THE COURT: All right. The report and recommendation of the United States Magistrate Judge is hereby adopted. The Court finds the defendant, Saul Molina-Martinez, guilty of the offense of being an alien unlawfully found in the United States after [4] having been convicted of an aggravated felony and deported, in violation of Title 8, United States Code, Section 1326(a) and (b).

All right. I'm going to reset this to March 4th at 8:30.

MR. CANTU: Thank you, Your Honor.

THE COURT: All right.

MR. HAGEN: May I be excused, Your Honor?

THE COURT: You may.

* * *

(End of requested transcript)

-oOo-

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: April 9, 2013

/s/_____
Signature of Court Reporter
Barbara Barnard

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA VS. SAUL MOLINA-MARTINEZ	CRIMINAL ACTION NO. B-12-848

SENTENCING
BEFORE THE HONORABLE ANDREW S. HANEN
MARCH 14, 2013
VOLUME 2

APPEARANCES:

For the Plaintiff:
MR. WILLIAM HAGEN
Assistant United States Attorney
Brownsville, Texas

For the Defendant:
MR. REYNALDO CANTU
Assistant U.S. Public Defender
Brownsville, Texas

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General Order 94-15, United States District Court, Southern District of Texas.

Transcribed by:
BARBARA BARNARD
Official Court Reporter
600 E. Harrison, Box 301
Brownsville, Texas 78520
(956) 548-2591

[6] THE COURT: B-12-848, United States of America versus Saul Molina-Martinez.

MR. HAGEN: Bill Hagen for the government.

(Defendant present.)

MR. CANTU: Reynaldo Cantu for the defendant.

(Defendant sworn.)

THE COURT: All right. Mr. Molina, you've gone over the presentence investigation report with Mr. Cantu?

THE DEFENDANT: Yes.

THE COURT: Mr. Cantu, do we have any objections that are yet to be unresolved [*sic*] ?

MR. CANTU: Yes, Your Honor. This is the case where we're raising the issue that the Tennessee statute and the definition of habitation is broader than the Model Penal Code's definition. And under analysis, it's – it allows someone to be convicted of

conduct that would not meet the criteria of burglary of a habitation.

THE COURT: And that is because?

MR. CANTU: The definition of habitation is overbroad. My initial – and if you remember, Your Honor, my initial objection had to be that – had to do with the fact that it did not have "with intent to commit a theft." But the indictment did have it in there, and there's language in – whatever I did with it. There's language in the case I supplied the Court that cures it.

[7] But my objection goes to the definition of habitation. And I supplied the Court with – well, that's my – that's going to be my objection. Do you want argument on that?

THE COURT: Well, what's the government's position on it?

MR. HAGEN: We're not going to agree. We think that the objection is not well-founded. We think that the 16-level increase is appropriate.

Did Your Honor – would Your Honor like me to elaborate why I think that's appropriate?

THE COURT: Yes, I would.

MR. HAGEN: Let me first offer Government's Exhibit No. 1, which is a copy of the seven prior convictions for aggravated burglary that this defendant has amassed in the last number of years.

Now –

THE COURT: Those will be admitted.

MR. HAGEN: Most of those judgments – I'm sorry. I thought you said admitted. I didn't hear the wait a minute, Your Honor.

THE COURT: No, I did. I said admitted.

MR. CANTU: Then I misheard. I'm sorry.

MR. HAGEN: Most of those judgments have – I think there's one that doesn't have a charging instrument attached to it, but they all make very clear that he entered with the intent [8] to commit a theft. And that was the first objection that was filed by Mr. Cantu, and he wanted to change that objection to a certain degree to suggest that the definition of habitation was overbroad; that the Tennessee statute or that the Tennessee law included things such as dairies and smokehouses that wouldn't normally be included in a generic burglary case today. And he provided some very old cases to the Court and to the government.

The cases that Mr. Cantu relies on, they were produced in 1842 and 1869, long before the invention of the light bulb, refrigeration and indoor toilet, so habitations were very different structures back then than they are today. I don't think one needs to spend any time with these old cases since the definition of habitation has been codified in Tennessee. It can now be found simply by looking at Tennessee Code, Section 3914401 [*sic*].

And the objection that Mr. Cantu is making today is that – concerns appurtenances and other structures besides the dwelling house. And I could not find a Fifth Circuit case that interpreted Tennessee Code 391401 [*sic*], but I did find a Fifth Circuit case that interprets the definition of habitation associated with the Texas Penal Code, Section 3002 [*sic*]. And I provided a copy of *Cardenas-Cardenas* to Mr. Cantu, and I give a copy to the Court.

And I think there's – the guidance that comes from *Cardenas-Cardenas* is dispositive when one compares the [9] definition of habitation in Tennessee with the definition of habitation in Texas because they're absolutely identical. And in *Cardenas-Cardenas* they say that a violation of 3002 [*sic*], the Texas burglary, is a enumerated offense and 16 levels is appropriate. I don't think 16 levels was assessed in *Cardenas-Cardenas*, but it's certainly the enumerated offense of burglary of a dwelling.

And I know that the Court's been provided with the Tennessee statute. I have a copy of the Texas statute. And the only difference is the Texas statute has an A and a B, and the Tennessee statute uses exactly the same language, but it's all included under Sections 1C.

THE COURT: Okay. Mr. Cantu?

MR. CANTU: Thank you, Your Honor.

I liked the government's – when the government gave me the *Cardenas-Cardenas*, they said it didn't

have the patina of my authority on cases. It's a relatively young case compared to my 1842 case.

If you look at the statute habitation, it includes any structure, including a self-propelled vehicle that's designed or adapted for overnight accommodation of persons and actually occupied. But then – and this – its [*sic*] almost the same language as *Armor versus State*, the 1842 case, and includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the [10] structure or vehicle.

And the easiest way I can explain it is with an example. You have someone with a recreational vehicle, and they're also towing a trailer where they keep their accordions and matters like that. It's like it's a band, okay? And so I think it's envisioned that if you break into the recreational vehicle, that's burglary of a habitation.

But under the Tennessee statute, the trailer that's attached to the back where nobody is sleeping but it's appurtenant can be counted [*sic*]. And the – if you remember the – I know that I supplied the cases to the Court, but this is *Armor versus State*, December 1842. They're talking about whether or not the dwellings appurtenant to the – to this mansion, this concept of mansion. And then likewise the *Palmer* case, *Palmer versus State*, December 1869, likewise is the same issue.

And so it's the defense position that this is a broader statute, doesn't meet the definition in the

Model Penal Code, and allows someone to be convicted, for example, of, like I said, stealing stuff from the trailer that's hooked up to the back of the recreational vehicle that's occupied by the polka band.

THE COURT: I'm going to overrule the objection. I think it's similar enough to the Texas statute that the Fifth Circuit will interpret it the same way.

Any other objections, Mr. Cantu?

[11] MR. CANTU: No, Your Honor.

THE COURT: Mr. Hagen, what's the government's position regarding sentencing?

MR. HAGEN: Probation has recommended the low end on this case, 77 months. I disagree with that recommendation. I'm asking for a high end sentence of 96 months.

This defendant has been convicted of seven aggravated burglaries. The first batch he was caught committing two aggravated burglaries that were committed in 2001 and 2002, and he was sentenced to three years confinement. After he got out of Tennessee prison, he committed a rash of other burglaries, Your Honor, and he was convicted of burglaries that took place in May of 2010, May of 2009. Actually four of them that he committed in May of 2009. Those are the offenses he was convicted of.

And when one looks at the language described in these offenses, especially in paragraph 26, he's breaking into people's homes. And as paragraph 26 represents, he was – when he was encountered, he was armed with a machete that he drew and ultimately dropped to the ground and fled.

But he's also an individual that has a history of marihuana, ecstasy, methamphetamine, and crack cocaine abuse. These offenses are not old. You know, the most recent one was in May of 2010, and he had an eight year prison sentence that was assigned with those convictions.

[12] And I think it is – I see no reason not to believe that when this defendant gets out of prison that he won't start burglarizing homes again. I think that is his profession. He's a burglar, and I think that he is in all likelihood going to hurt somebody. And to protect the public from this defendant, we're asking that he be confined for 96 months. I think it's unreasonable to believe that he will not return. I think it's unreasonable to believe that he won't continue to engage in criminal behavior given his criminal history.

THE COURT: Mr. Cantu?

MR. CANTU: Well, Your Honor, part of the argument or a major part of the argument is the potential of my client's conduct after he's discharged. The point is that he has excessive – at the same time the government is talking about all of these burglary convictions. No violence was used on any of those

convictions. He did have a machete with him, but that could have been used as a pry bar. The point is he did not use it. He dropped it and fled.

The other part of it is the motivation for the burglaries had to do with the fact that this man was a – was a drug addict and was just supporting his habit, and that's why the rash of burglaries. That's very common. But he never used violence apart from the actual entry of the vehicle.

77 months is a severe sentence. And then after the 77 months, he'll be deported with probably a special release term. [13] That is more than adequate to ensure he doesn't come back again.

THE COURT: Mr. Molina, would you like to address the Court?

THE DEFENDANT: First of all, I want to apologize to you, Your Honor, and the U.S. Attorney and my attorney for placing him in this situation. When I came to the United States, it was in '98. I was working fine, sending money to my family. But in 2001, I started – I became addicted. That's when I had my first felony.

After that I went back to Mexico to complete my college. Over there I graduated as a veterinarian. But since the crime was so strong in Mexico, I came back to the United States. So I started my addiction. I continued committing crimes. This time when I was in prison, I got rehabilitated.

Right now I have a five-year-old daughter and a wife, and they are the reasons why I came back to the United States.

THE COURT: Where are they?

THE DEFENDANT: They live in Tennessee right now.

I ask you to have consideration on me because this time I want to go back to my country and take my family. Now I know that coming to the United States is not for me. And with the education I have, my studies, I know I can make it in Mexico.

I think that's all, Your Honor. And thank you very much for your attention.

THE COURT: All right. Thank you, sir.

[14] All right. The Court adopts the factual findings and guideline applications in the presentence investigation report. It's the judgment of the Court that the defendant, Saul Molina-Martinez, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 77 months. Upon release from imprisonment, Defendant shall be placed on supervised release for a term of three years without supervision.

While on supervised release, Defendant shall not commit another state, federal or local crime, he shall comply with the standard conditions that have been adopted by this Court, abide by any mandatory conditions required by law, and shall comply with the following additional conditions.

Defendant shall not illegally possess a controlled substance and shall refrain from any unlawful use of a controlled substance. Defendant shall not possess a firearm, destructive device, or other dangerous weapon. Defendant is not to reenter the United States illegally, and he shall cooperate in the collection of a DNA sample if it's authorized by statute.

The Court finds the defendant does not have the ability to pay a fine and waives the fine, but does impose the special assessment of $100.

MR. HAGEN: Move to remit that assessment, Your Honor.

THE COURT: All right. That will be granted.

Does he want me to recommend a Tennessee facility?

[15] MR. CANTU: No, Your Honor.

THE COURT: Okay.

THE DEFENDANT: Yes.

MR. CANTU: Yes, he does? Okay. Well –

THE DEFENDANT: I will talk to my attorney about that?

THE COURT: Yes.

MR. CANTU: Thank you.

THE COURT: Okay. So not now?

MR. CANTU: Not now.

THE COURT: Okay. All right.

MR. CANTU: May I be excused, Your Honor?

MR. HAGEN: May I be excused, Your Honor?

THE COURT: You may.

(End of requested transcript)

* * *

-oOo-

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: April 9, 2013

/s/_____
Signature of Court Reporter
Barbara Barnard

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Brownsville

UNITED STATES OF AMERICA

V.

SAUL MOLINA-MARTINEZ

☐ See Additional Aliases.

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **1:12CR00848-001**

USM NUMBER: 70746-179

Reynaldo S. Cantu, Jr.
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 on October 11, 2012

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendants adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
8 U.S.C. §§ 1326(a) and 1326(b)	Alien Unlawfully Found in the United States After Deportation, Having Been Previously Convicted of an Aggravated Felony	08/31/2012	1

☐ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____
☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 14, 2013
Date of Imposition of Judgment

Andrew Hanen
Signature of Judge

ANDREW S. HANEN
UNITED STATES
DISTRICT JUDGE
Name and Title of Judge

March 22, 2013
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 77 months.

☐ See Additional Imprisonment Terms.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.
The Court further orders the supervised release term be without supervision.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that

the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state registration in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant is not to re-enter the United States illegally.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution), to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Additional Restitution Payees.

TOTALS	$	0.00	$	0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine ☐ restitution.

  ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☒ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-40324

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SAUL MOLINA-MARTINEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:12-CR-848-1

(Filed Dec. 17, 2014)

Before STEWART, Chief Judge, and JONES and HIGGINSON, Circuit Judges.

PER CURIAM:*

Saul Molina-Martinez pleaded guilty, without the benefit of a plea agreement, to being illegally present in the United States following deportation, having

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

been convicted of an aggravated felony. 8 U.S.C. §§ 1326(a), (b). The district court sentenced Molina-Martinez to 77 months in prison, at the bottom of the 77 to 96 month Sentencing Guidelines range set forth in the presentence report, and to a three-year term of supervised release. For the first time on appeal, Molina-Martinez argues that the district court erred in calculating his criminal history category, and that the correct Guidelines range should have been 70 to 87 months. Because he did not object on this ground in the district court, we review the claim for plain error. *See United States v. Mudekunye*, 646 F.3d 281, 289 (5th Cir. 2011). Molina-Martinez must show an error that is clear or obvious and that affects his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes such a showing, we have the discretion to correct the error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.*

Under the Sentencing Guidelines, prior sentences are counted as a single sentence if they were imposed on the same day, unless the "offenses were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2(a)(2). Molina-Martinez committed four aggravated burglaries in Tennessee in May 2009, and he committed a fifth aggravated burglary and a theft in May 2010. His first arrest for any of these offenses occurred in June 2010. The probation officer imposed a total of nine criminal history points for three of these offenses

pursuant to U.S.S.G. § 4A1.1(a) and two additional points for the uncounted offenses under § 4A1.1(e), resulting in a total of 18 criminal history points and a criminal history category of VI. However, because there was no intervening arrest between the Tennessee burglaries, Molina-Martinez should have received only a total of 12 criminal history points, which results in a criminal history category of V. The correct calculation would have reduced Molina-Martinez's Guidelines range from 77-96 months to 70-87 months. The government concedes this error. Molina-Martinez therefore has shown a plain or obvious error in the criminal history calculation. *See Puckett*, 556 U.S. at 135.

Molina-Martinez has not, however, established that the error affected his substantial rights. Molina-Martinez must "show a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence." *United States v. Garcia-Carrillo*, 749 F.3d 376, 379 (5th Cir. 2014) (internal quotation marks and citation omitted).[1] The district court imposed a prison sentence of 77 months, which is at the bottom of the Guidelines range applied by the court and in the middle of the properly calculated range. "[W]hen the

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[1] Although Molina-Martinez contends that an error in the Guidelines calculations should be considered presumptively prejudicial, he concedes that the issue is foreclosed by our precedent and raises the argument only to preserve it for further review.

correct and incorrect ranges overlap *and the defendant is sentenced within the overlap*, 'we do not assume, in the absence of additional evidence, that the sentence affects a defendant's substantial rights.'" *Mudekunye*, 646 F.3d at 290 (emphasis in original) (quoting *United States v. Blocker*, 612 F.3d 413, 416 (5th Cir. 2010)). Thus, because his sentence fell within both the correct and incorrect Guidelines range, Molina-Martinez acknowledges that our controlling caselaw obliges him to point to "additional evidence" in the record, other than the difference in ranges, to show an effect on his substantial rights. *United States v. Pratt*, 728 F.3d 463, 481-82 (5th Cir. 2013). Record evidence that the Guidelines range was a "primary factor" in sentencing may be sufficient "additional evidence." *Id.* at 482. In *Pratt*, the district court affirmatively stated on the record that it felt a within-Guidelines sentence was appropriate and that it was choosing a sentence in the middle of the Guidelines range; we noted that this was evidence that the Guidelines range was a primary factor in sentencing. *Id.*[2]

Molina-Martinez has not shown additional evidence that the sentence affected his substantial rights. The mere fact that the court sentenced Molina-Martinez to a low-end sentence is insufficient on its own to show that Molina-Martinez would have

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[2] The court noted also in *Pratt* that there was uncertainty whether an overlap existed at all between the Guidelines range utilized and the correct range. *See Pratt*, 728 F.3d at 482.

received a similar low-end sentence had the district court used the correct Guidelines range. *See United States v. Jones*, 596 F.3d 273, 279 (5th Cir. 2010). The district court made no explicit statement suggesting that the Guidelines range was a primary factor in sentencing. Neither the parties' anchoring of their sentencing arguments in the Guidelines nor the district court's refusal to grant the government's request for a high-end sentence of 96 months is "additional evidence" that the sentence affected Molina-Martinez's substantial rights. Accordingly, Molina-Martinez has not established plain error warranting reversal by this court. *See Puckett*, 556 U.S. at 135. The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-40324

D.C. Docket No. 1:12-CR-848-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SAUL MOLINA-MARTINEZ,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas, Brownsville

Before STEWART, Chief Judge, and JONES and HIGGINSON, Circuit Judges.

JUDGMENT

(Filed Dec. 17, 2014)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

[SEAL]

Certified as a true copy and issued as the mandate on Jan 08, 2015

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

(ORDER LIST: 576 U.S.)

THURSDAY, OCTOBER 1, 2015

CERTIORARI GRANTED

* * *

14-8913 MOLINA-MARTINEZ, SAUL V.
UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted.

* * *

No. 14-8913

In The
Supreme Court of the United States

SAUL MOLINA-MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

MARJORIE A. MEYERS
Federal Public Defender
SOUTHERN DISTRICT OF TEXAS
TIMOTHY CROOKS*
LAURA FLETCHER LEAVITT
Assistant Federal Public Defenders
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
(713) 718-4600
tim_crooks@fd.org
Counsel for Petitioner

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Where an error in the application of the United States Sentencing Guidelines results in the application of the wrong Guideline range to a criminal defendant, should an appellate court presume, for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b), that the error affected the defendant's substantial rights?

LIST OF PARTIES

1. United States of America.
2. Saul Molina-Martinez.

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OPINION BELOW

The opinion of the Court of Appeals (J.A. 45-49) is reported at 588 Fed. Appx. 333.

JURISDICTION

The judgment of the Court of Appeals (J.A. 50-51) was entered on December 17, 2014. The petition for a writ of certiorari was filed on March 16, 2015, and granted on October 1, 2015. (J.A. 52) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT OF THE CASE

On August 31, 2012, agents of the United States Bureau of Customs and Border Protection found petitioner Saul Molina-Martinez and eight other persons on the East Turcotte Ranch near Sarita, Texas. (Presentence Report ["PSR"] ¶ 4) It was determined that petitioner was a citizen and national of Mexico with no legal status in the United States. (PSR ¶ 4) He had unlawfully entered the United States without

inspection on August 26, 2012, by crossing the Rio Grande River near Hidalgo, Texas. (PSR ¶ 5) Petitioner had been previously deported from the United States to Mexico on February 5, 2007, and August 20, 2012. (PSR ¶ 5) Petitioner was arrested, and the Federal Public Defender for the Southern District of Texas was appointed to represent him. (J.A. 1)

On September 25, 2012, petitioner was indicted in the Brownsville Division of the Southern District of Texas for being found unlawfully present in the United States after deportation, in violation of 8 U.S.C. § 1326(a) and (b). (J.A. 12-13) On October 11, 2012, petitioner pleaded guilty to the indictment (J.A. 2-3), although he reserved the right to challenge whether he in fact had a qualifying pre-deportation "aggravated felony" conviction.[1]

The court ordered preparation of a presentence report ("PSR") to assist it in sentencing petitioner. (J.A. 3) Applying United States Sentencing Guideline ("USSG") § 2L1.2, the PSR calculated petitioner's total offense level as 21. (PSR ¶¶ 20, 22)

Examining petitioner's prior convictions, the PSR calculated petitioner's Guideline criminal history score to be 18, in the following manner:

---

[1] A pre-deportation conviction for an "aggravated felony" elevates the statutory maximum sentence to 20 years. *See* 8 U.S.C. § 1326(b)(2).

Date of sentence	Offense and sentence	USSG §	Points	PSR ¶
3/6/02	Speeding/no driver's license: 18 days' custody	4A1.2(c)(1)	0	24
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(a)	3	25
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(e)	1	26
1/19/07	Illegal entry into the United States: time served (about 2 days)	4A1.1(c)	1	27
4/7/11	Aggravated burglary/theft of property over $1,000: 8 years' custody/2 years' custody	4A1.1(a)	3	28
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(a)	3	29
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	1	30
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	1	31

4/7/11	Aggravated burglary: 8 years' custody	4A1.1(a)	3	32
	On parole at the time of the commission of the instant offense	4A1.1(d)	2	34
Criminal history total			**18**	35

A total criminal history score of 18 placed petitioner in Guideline Criminal History Category VI (PSR ¶ 35), and, coupled with his total offense level of 21, this resulted in a recommended Guideline imprisonment range of 77 to 96 months. (PSR ¶ 74)

Although petitioner objected to the PSR's offense level calculation (J.A. 16-18), he did not object to the PSR's criminal history scoring. At the final sentencing hearing on March 14, 2013, the District Court overruled petitioner's objection to the PSR (J.A. 30) and adopted the PSR's Guideline calculations, including the PSR's criminal history scoring. (J.A. 33) Although the Government urged the District Court to sentence petitioner to 96 months' imprisonment (the top of the Guideline imprisonment range calculated by the PSR) (J.A. 30-31), the District Court rejected that request and instead sentenced petitioner to 77 months' imprisonment, the bottom of the Guideline imprisonment range calculated by the PSR. (J.A. 33,

38) The District Court also sentenced petitioner to a three-year term of supervised release. (J.A. 33, 39) The District Court declined to order a fine, and it also ordered the $100 special assessment remitted (forgiven) on motion of the Government. (J.A. 34, 43-44)

Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. (J.A. 6) Initially, appellate counsel filed a brief and a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). (J.A. 7) However, on January 14, 2014, the Fifth Circuit denied that motion without prejudice (J.A. 8), for the following reasons:

> The record reveals a potentially non-frivolous issue relating to the calculation of the criminal history category. The probation officer assessed 11 of Molina-Martinez's 18 criminal history points for five prior state sentences, although Molina-Martinez was sentenced in these cases on the same day. Prior sentences are counted as a single sentence if they were imposed on the same day, unless the "offenses were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2(a)(2). Molina-Martinez committed four of the offenses in May 2009 and the other in May 2010, but he was arrested for these crimes in June and October 2010. Thus, it appears that a non-frivolous argument can be made that Molina-Martinez's offenses were not separated by an "intervening arrest" for one of the earlier offenses, and it is not clear

> whether the probation officer correctly assessed a total of 11 criminal history points for these sentences. Additionally, although Molina-Martinez was arrested in May 2009, following the commission of the first four offenses, this arrest was for an unrelated charge[,] and it is not clear whether this would constitute an "intervening arrest" for purposes of § 4A1.2.

Order, *United States v. Molina-Martinez*, No. 13-40324, at 1-2 (5th Cir. Jan. 14, 2014) (unpublished). Accordingly, the Fifth Circuit ordered counsel "to file a supplemental *Anders* brief or a brief on the merits addressing whether the criminal history category was accurately calculated and any other non-frivolous matters." *Id.* at 2.

Counsel then filed a merits brief arguing that the district court had plainly erred in scoring petitioner's criminal history under the Guidelines. Particularly, the brief argued that under the "single sentence" rule of USSG § 4A1.2(a)(2),[2] petitioner's Guideline

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[2] The Sentencing Guidelines provide that prior sentences received on the same day count as but a single sentence, unless they are separated by an intervening arrest:

> If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately

(Continued on following page)

criminal history score should have been calculated as follows (with lined-out text indicating where the PSR had erred in its scoring):[3]

Date of sentence	Offense and sentence	USSG §	Points	PSR ¶
3/6/02	Speeding/no driver's license: 18 days' custody	4A1.2(c)(1)	0	24
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(a)	3	25
5/24/02	Aggravated burglary: 3 years' custody	4A1.1(e)	1	26
1/19/07	Illegal entry into the United States: time served (about 2 days)	4A1.1(c)	1	27

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unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. *See also* § 4A1.1(e).

USSG § 4A1.2(a)(2).

[3] Because the Government has never disputed this corrected calculation of petitioner's criminal history score, petitioner has not, in this brief, set out the somewhat convoluted Guideline applications underlying this corrected calculation. They are, however, set out in petitioner's opening brief in the Court of Appeals. *See* Pet. C.A. Br. 12-16.

~~1~~/7/11	Aggravated burglary/theft of property over $1,000: 8 years' custody/ 2 years' custody	4A1.1(a)	3	28
4/7/11	Aggravated burglary: 8 years' custody	~~4A1.1(a)~~ 4A1.1(e)	~~3~~ 1	29
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	1	30
4/7/11	Aggravated burglary: 8 years' custody	~~4A1.1(a)~~ 4A1.1(e)	~~1~~ 0	31
4/7/11	Aggravated burglary: 8 years' custody	4A1.1(e)	~~3~~ 0	32
	On parole at the time of the commission of the instant offense	4A1.1(d)	2	34
Criminal history total			~~18~~ **12**	

With a total of 12 criminal history points, petitioner argued, he should have been placed in Criminal History Category V, not Criminal History Category VI. Moreover, he said, his Guideline imprisonment range should have been 70 to 87 months,

not the range of 77 to 96 months used by the District Court.

Before the Fifth Circuit, the Government conceded that the District Court had indeed erred as set out above, and that this error was "plain." (J.A. 47 [opinion below]; *see also* Resp. C.A. Br. 10, 13-16) The Government nevertheless contended that petitioner was not entitled to relief because he had not shown an effect on his substantial rights, *see* Resp. C.A. Br. 10-11, 16-20, and because he had likewise not shown a serious effect on the fairness, integrity, or public reputation of judicial proceedings. *See* Resp. C.A. Br. 11-12, 21-22.

The Fifth Circuit agreed that petitioner "ha[d] shown a plain or obvious error in the criminal history calculation." (J.A. 47) (citation omitted) The Fifth Circuit, however, found that petitioner had not shown that the error affected his substantial rights. (J.A. 47-49) Because the correct Guideline imprisonment range (70 to 87 months) overlapped with the incorrect range (77 to 96 months), and because petitioner was sentenced within the overlap (to 77 months' imprisonment), the Fifth Circuit applied its rule that petitioner had to come forward with "additional evidence" that his substantial rights were affected. (J.A. 48) (citing *United States v. Pratt*, 728 F.3d 463, 481-82 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1328 (2014)) Finding that petitioner had not adduced such

"additional evidence,"[4] the Fifth Circuit affirmed the judgment of sentence. (J.A. 48-49)

Along the way, "[petitioner] preserve[d] for possible further review his contention that an error that alters the Guideline range should be ***presumed*** prejudicial, even where the sentence actually imposed falls within the correct Guideline range." Pet. C.A. Br. 17 n.6 (emphasis in original; citing *United States v. Knight*, 266 F.3d 203, 207-10 (3d Cir. 2001)). In its opinion, the Fifth Circuit recognized this argument and that petitioner had preserved it for further review, but noted that it was foreclosed by Fifth Circuit precedent. (J.A. 47 n.1)

This Court granted certiorari on October 1, 2015. (J.A. 52)

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[4] Petitioner argued that there was such "additional evidence" here in that (1) he received the bottom of what the District Court believed to be the applicable Guideline imprisonment range, notwithstanding the fact that the Government asked for the top of the range; and (2) the parties' arguments respecting the sentence were firmly anchored in the Guideline range. *See* Pet. C.A. Br. 17-18; Pet. C.A. Reply Br. 3-7. The Fifth Circuit, however, rejected that argument. (J.A. 48-49)

SUMMARY OF ARGUMENT

Given the unique centrality and influence of the United States Sentencing Guidelines to federal sentencing, errors in the calculation of the Guidelines are very likely to affect the sentence imposed on a federal criminal defendant. But, because district courts are not required to give much (or any) explanation for a within-Guidelines sentence, it may be difficult in a typical case for a defendant to make a case- and fact-specific showing that the error affected the sentence. For the reasons discussed in this brief, the Court should adopt a rebuttable presumption that obvious misapplications of the Guidelines, resulting in the application of an erroneous Guideline imprisonment range, affect a defendant's substantial rights, thus satisfying the third prong of plain-error review.

Pursuant to Federal Rule of Criminal Procedure 52(b), a court of appeals may correct a forfeited error that is plain and affects a defendant's substantial rights. This Court has held that, under Rule 52(b), in order to demonstrate an effect on substantial rights, a defendant must normally make a specific showing of prejudice flowing from the error. However, the Court has also said that there may be some "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *United States v. Olano*, 507 U.S. 725, 735 (1993).

The notion of a rebuttable presumption of harm or prejudice did not originate in *Olano*. Nearly 50 years before *Olano*, the Court in *Kotteakos v. United*

States, 328 U.S. 750 (1946), made clear that, at least in criminal cases, courts may make use of rebuttable presumptions that certain classes of errors are harmful where empirical evidence and experience demonstrate that the "natural effect" of the error is to affect a defendant's substantial rights. Together, *Olano* and *Kotteakos* suggest that it is appropriate to presume prejudice where (1) the "natural effect" of a particular type of error is to affect a defendant's substantial rights (*i.e.*, where empirical evidence and experience suggest that a particular type of error is, across the board, likely to have an effect on the outcome), and (2) the nature of the error makes it likely that "the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735.

Drawing the same conclusion, several federal courts of appeals have explicitly adopted a presumption of prejudice for a handful of errors where, in those courts' view, the "natural effect" of the error is to affect substantial rights, but the actual effect of the error in a given case is usually difficult to ascertain and prove. Most relevant to the instant case, the Third and Tenth Circuits have explicitly applied a presumption of prejudice to forfeited claims of misapplications of the Guidelines. *See United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014); *United States v. Knight*, 266 F.3d 203, 207-10 (3d Cir. 2001). And, other circuits appear to implicitly apply the functional equivalent of such a presumption, albeit not couched in presumption-type terms.

These circuits are correct: the use of an erroneous Guideline range is one of the limited class of errors for which prejudice should be presumed. First, case law (including this Court's decisions in *Gall v. United States*, 552 U.S. 38 (2007), *Rita v. United States*, 551 U.S. 338 (2007), and *Peugh v. United States*, 133 S. Ct. 2072 (2013)), empirical evidence, and experience demonstrate beyond peradventure that the "natural effect" of the Guidelines is to influence the length of the sentence imposed. Therefore, when a sentencing court uses an erroneously high Guideline range, it will likely skew the ultimate sentence higher than it otherwise would be, even if the court ultimately decides to go outside the Guidelines.

Furthermore, although the "natural effect" of an erroneous Guideline range is to affect the sentence ultimately imposed, it is generally very difficult for a defendant to make a case- and fact-specific showing of that effect. This is so because federal district courts have been told that a sentence within the Guidelines generally requires very little explanation. If, as in the instant case, the district court says little or nothing about the reasons for its choice of sentence, a defendant may be unable to make a case- and fact-specific showing of prejudice flowing from the use of an erroneous Guideline range, despite the great likelihood that the error ***did*** affect the sentence.

Because the proposed presumption is rebuttable, it will not be applied woodenly so as to compel reversals in cases where the error is obviously harmless. Moreover, a rebuttable presumption of prejudice has

several benefits. In addition to helping to remedy the profound injustice of excess imprisonment, a presumption of prejudice has the institutional benefit of allowing the district court to exercise its sentencing authority and discretion in light of the correct Guideline range. Additionally, correction of obvious sentencing errors promotes better ongoing development of the Guidelines.

Finally, a presumption of prejudice for errors resulting in the application of an incorrect Guideline range will not compromise the interests protected by the plain-error rule. The burden and cost of a resentencing are modest in comparison with the burden and cost of a retrial after reversal of a conviction. Furthermore, such a presumption will not, in the context of this particular class of errors, encourage defendants to withhold timely objections; rather, the presumption will facilitate redress for errors that escaped everyone's attention through inadvertence or oversight. And, even if the Government is, in a particular case, unable to rebut the presumption, appellate courts retain discretion under the fourth prong of plain-error review to take into account unusual circumstances that make the plain error nevertheless undeserving of correction.

If this Court agrees that such a presumption should apply, then the Court should reverse the judgment below and remand for application of that presumption and further proceedings consistent therewith. In the alternative, even if the Court does not adopt such a presumption, the Court should hold that

petitioner nevertheless met his burden of establishing an effect on his substantial rights, because the record shows at least a reasonable probability that the sentence would be lower under the correct Guideline range. For all these reasons, whether or not the Court holds that a presumption of prejudice is warranted, the Court should reverse the judgment of the Fifth Circuit and remand for further proceedings.

ARGUMENT

WHERE A CLEAR MISAPPLICATION OF THE UNITED STATES SENTENCING GUIDELINES RESULTS IN THE APPLICATION OF AN ERRONEOUS GUIDELINE RANGE TO A DEFENDANT, THE COURT OF APPEALS SHOULD APPLY A REBUTTABLE PRESUMPTION THAT THE ERROR AFFECTED THE DEFENDANT'S SUBSTANTIAL RIGHTS FOR PURPOSES OF APPLYING FEDERAL RULE OF CRIMINAL PROCEDURE 52(b).

A. Introduction.

Since 1987, the United States Sentencing Guidelines have been an integral part of the federal criminal-justice system. Even after *United States v. Booker*, 543 U.S. 220 (2005), when the Court held that the Guidelines were advisory, rather than mandatory, the Guidelines continue to occupy a uniquely central and influential role in federal sentencing. As a consequence, when errors occur in the calculation of the

Guideline range, such errors are quite likely to affect the sentence imposed.

But, because the Guidelines are so complex, it is unavoidable that some Guideline calculation errors will be overlooked in the district court; and if such errors are then raised for the first time on appeal, they will be subject to the stringent plain-error rule, which normally requires a case- and fact-specific showing that the error affected the sentence. In a typical case, it will be difficult or impossible to make such a showing, because sentences within what the district court believes to be the Guideline range have been held to require little or no explanation.

As more fully explained below, this Court should, in light of (1) the unique centrality of the Guidelines to federal sentencing and (2) the difficulty in showing, in a typical case, that an erroneous Guideline range affected the sentence, adopt a rebuttable presumption that clear misapplications of the Guidelines, resulting in the application of an erroneous Guideline range, affect a defendant's substantial rights, thus satisfying the third prong of plain-error review.

B. Plain-Error Review: *Olano* and Beyond.

"'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States v. Olano*, 507 U.S. 725, 731

(1993) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)). This contemporaneous-objection principle[5] gives the district court – which "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute," *Puckett v. United States*, 556 U.S. 129, 134 (2009) – the opportunity to "correct or avoid the mistake so that it cannot possibly affect the ultimate outcome." *Id.* In this way, the contemporaneous-objection principle promotes efficiency by "reduc[ing] wasteful reversals." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). "And of course the contemporaneous-objection rule prevents a litigant from '"sandbagging"' the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Puckett*, 556 U.S. at 134 (citations omitted).

On the other hand, the Court has also observed that "'[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with the rules of fundamental justice.'" *Olano*, 507 U.S. at 732 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); brackets and ellipsis by the *Olano* Court). And that is where the plain-error rule comes in. The plain-error

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[5] In federal criminal law, this principle is codified in Federal Rules of Criminal Procedure 30(d) and 51(b) and Federal Rule of Evidence 103(a).

rule is meant to be a safety valve from the rigors of the unrelieved application of the contemporaneous-objection/forfeiture rule. *See, e.g.*, *United States v. Young*, 470 U.S. 1, 15 (1985) (plain-error rule "tempers the blow of a rigid application of the contemporaneous-objection requirement"); *United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996) ("The plain error rule is protective; it recognizes that in a criminal case, where a defendant's substantial personal rights are at stake, the rule of forfeiture should bend slightly if necessary to prevent a grave injustice."). In short, the plain-error rule reflects this Court's "insistence that obvious injustice be promptly redressed." *United States v. Frady*, 456 U.S. 152, 163 (1982).

These competing values explain why "Federal Rule of Criminal Procedure 52(b),[6] which governs on appeal from criminal proceedings, provides a court of appeals [only] a limited power to correct errors that were forfeited because not timely raised in district court." *Olano*, 507 U.S. at 731. In order for a forfeited error to be corrected under Rule 52(b), (1) there must be an "error," (2) that is "plain," and (3) that affects substantial rights. *See id.* at 732-34. If these first three requirements are met, the court of appeals has the discretion to correct the error, but "the court should not exercise that discretion unless the error seriously affects the fairness, integrity or public

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[6] Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

reputation of judicial proceedings." *Id.* at 732 (internal brackets, quotation marks, and citations omitted); *see also id.* at 735-37.

This case concerns the third prong of *Olano*'s plain-error test, namely, the requirement that the plain error have affected the party's substantial rights. "[I]n most cases [this requirement] means that the error must have been prejudicial: It must have affected the outcome of the district-court proceedings." *Id.* at 734. And, where a defendant seeks reversal under Rule 52(b), normally "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* In the normal case, this means that "the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights'[7] prong of Rule 52(b)." *Id.* at 735. And that showing requires that the defendant demonstrate a "reasonable probability" that, but for the error, the outcome of the proceeding would have been different. *See Dominguez Benitez*, 542 U.S. at 82-83. Put another way, "[a] defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the

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[7] In the current version of Rule 52(b), the phrase is "affects substantial rights." The change in verb form from the version of the rule quoted in *Olano* was "intended to be stylistic only." Fed. R. Crim. P. 52, Advisory Committee Notes (2002 Amendments).

outcome' of the proceeding." *Id.* at 83 (citations omitted).[8]

In *Olano*, however, the Court declined to "decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.'" *Olano*, 507 U.S. at 735. The Court first held that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome " *Id.* Second, the Court stated that it did not need to "address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Id.*

The Court nevertheless gave thorough consideration to whether either of these exceptions should apply in Olano's case. *See id.* at 737-41. The Court first determined that the particular error at issue there – namely, allowing alternate jurors to be present during jury deliberations – was "not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact." *Id.* at 737 (brackets in original); *see also id.* at 737-39. The Court also held that it would not "presume prejudice for purposes of the Rule 52(b) analysis," *id.* at 740, because the circumstances surrounding the error (especially the

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[8] The Court cautioned that "[this] rule does not, however, foreclose relief altogether [because t]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Dominguez Benitez*, 542 U.S. at 83 n.9 (citation omitted).

appropriate jury instructions to the alternate jurors, which they were presumed to have followed) did not create an inherently prejudicial situation. *See id.* at 740-41. Finding also that the respondent had not demonstrated case-specific prejudice arising from the error, *see id.* at 739-40, the Court held that the third prong of plain-error review had not been satisfied and therefore reversed the judgment of the court of appeals. *See id.* at 741.

There are important differences between *Olano*'s two exceptions to the normal requirement of case-specific prejudice. The Court has implied that the first *Olano* exception – namely, the "special category of forfeited errors that can be corrected regardless of their effect on the outcome," *Olano*, 507 U.S. at 735 – refers to the very limited class of errors known as "structural errors," *see, e.g.*, *United States v. Marcus*, 560 U.S. 258, 263 (2010); *United States v. Cotton*, 535 U.S. 625, 632 (2002), and that is how the federal courts of appeals have understood the first *Olano* exception. *See, e.g.*, *United States v. White*, 405 F.3d 208, 221 (4th Cir. 2005) ("We have recognized that this language refers to structural errors.") (citations omitted); *United States v. Barnett*, 398 F.3d 516, 526 (6th Cir. 2005) (same). Although the Court has not finally decided whether "structural errors" always satisfy the third prong of plain-error review (more on this below), such a holding would mean that prejudice is completely taken out of the equation, and that the "structural error" *ipso facto* affects substantial rights – in effect, conclusively, or irrebuttably, establishing

that substantial rights were affected. However, the Court need not decide that point here, because petitioner does not claim that the type of error at issue in this case is a "structural error" or otherwise fits into *Olano*'s first exception.

The second *Olano* exception is a horse of a different color. As *Olano* demonstrates, the second exception, unlike the first, does not dispense with the question of prejudice altogether. Rather, as the Court there said, "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry," namely, whether the error affected the outcome. *Olano*, 507 U.S. at 739. Thus, under the second *Olano* exception, instead of the "specific analysis" of prejudice that is the norm, a particular type of error may, even without such an analysis, be presumed to affect the outcome, because of the characteristics of the type of error at issue and the reasonable probability that, across the board, such errors will affect the outcome in cases in which they arise. *See id.* at 740-41. And, the use of the term "presumption" in describing the second *Olano* exception strongly suggests that the presumption of an effect on substantial rights is rebuttable by specific record evidence – in sharp contrast to the first *Olano* exception, which, as stated, appears to conclusively and irrebuttably satisfy the third prong of plain-error review.

Since *Olano*, the Court has several times returned to the question of the third prong of plain-error review generally, and the first *Olano* exception particularly, but the Court has never given further

guidance on the second *Olano* exception. In the first of these cases, *Johnson v. United States*, 520 U.S. 461 (1997), the petitioner argued that the error in her case (failing to submit to the jury the element of the materiality of an allegedly false statement) was a "structural error" that *ipso facto* affected substantial rights, irrespective of prejudice – in other words, the first *Olano* exception. *See Johnson*, 520 U.S. at 468. Expressing doubt that the error in question was in fact "structural," *see id.* at 469, the Court ultimately pretermitted the question whether the third prong of plain-error review was satisfied, holding that, even if it were, the petitioner could not show entitlement to relief under the fourth prong. *See id.* at 469-70.

To similar effect is the Court's decision in *Cotton*. In *Cotton*, the respondents argued that the error in their case (the failure of the indictment to charge a threshold drug quantity necessary to invoke a higher statutory maximum term of imprisonment) was a "structural error" falling within *Olano*'s first exception. *See Cotton*, 535 U.S. at 632. As in *Johnson*, the Court pretermitted the third prong, and held that, even if the third prong were satisfied, the respondents were not entitled to relief under the fourth prong of plain-error review. *See id.* at 632-34.

In *Dominguez Benitez*, the Court confronted a plain noncompliance with Federal Rule of Criminal Procedure 11 (governing the taking of guilty pleas in federal court). The Court briefly adverted to "structural errors," but then noted that the respondent had made no claim that the error in question was

"structural."[9] *See Dominguez Benitez*, 542 U.S. at 81. The Court then held that this particular type of error was subject to the usual rule that the party claiming error must show a specific effect on his substantial rights, and the Court provided further guidance on what that showing required. *See id.* at 81-83. The Court did not analyze – indeed, it did not even mention – the second *Olano* exception.

In *Puckett*, the Court again confronted a claim that the error in that case (breach of the petitioner's plea agreement with the Government) was "structural" and thus fell within the first *Olano* exception. *See Puckett*, 556 U.S. at 140. The Court again declined to decide whether "structural errors" *ipso facto* satisfied the third prong, *see id.* at 140-41, because it held that "breach of a plea deal is not a 'structural' error as we have used that term." *Id.* at 141. Rather, said the Court, a petitioner claiming that an unobjected-to breach of a plea agreement affected his substantial rights must make a specific showing of prejudice flowing from the breach. *See id.* at 141-42. The Court did not analyze or mention the second *Olano* exception.

Most recently, in *Marcus*, the respondent had raised, for the first time on appeal, a claim that he

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[9] The Court also said, however, that "[t]he argument, if made, would not prevail" because "[t]he omission of a single Rule 11 warning without more is not colorably structural." *Dominguez Benitez*, 542 U.S. at 81 n.6 (citation omitted).

had been unconstitutionally convicted on the basis of conduct that preceded the enactment of the statute under which he was charged. *See Marcus*, 560 U.S. at 260. The Court considered whether the error in question was "structural," and then concluded that it was not. *See id.* at 263-65. Finding that the court of appeals had applied an erroneously low standard of actual prejudice under the third prong of plain-error review ("any possibility [of prejudice], no matter how unlikely"), *see id.* at 260, 263, and also finding that the court of appeals' ruling was inconsistent with the Court's teachings on the fourth prong of plain-error review, *see id.* at 265-66, the Court reversed the court of appeals' judgment. *See id.* at 266. As in all of the preceding cases, the Court did not analyze or even mention the second *Olano* exception.

Consequently, *Olano*'s second exception to a specific showing of case-specific prejudice – namely, the exception for "errors that should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice," *Olano*, 507 U.S. at 735 – remains "essentially in the same place [it] w[as] after *Olano*." Brent Ferguson, *Plain Error Review and Reforming the Presumption of Prejudice*, 44 N.M. L. Rev. 303, 309 (2014). But *Olano* is not the Court's only guidance on presumptions of prejudice or harm. As will be demonstrated, the Court has spoken elsewhere about the appropriateness of such presumptions.

C. Under the Court's Case Law, It Is Appropriate, Especially in a Criminal Case, to Adopt a Rebuttable Presumption of Harm Where the "Natural Effect" of a Particular Class of Error Is to Affect a Defendant's Substantial Rights.

Almost half a century before *Olano*, in *Kotteakos v. United States*, 328 U.S. 750 (1946), the Court analyzed what it meant for an error to affect substantial rights.[10] The Court held that "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos*, 328 U.S. at 765.

The Court has "warned against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record." *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (citing *Kotteakos*, 328 U.S. at

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[10] Although *Kotteakos* (and *Shinseki v. Sanders*, 556 U.S. 396 (2009)) discussed this topic in the context of harmless error, not plain error, the Court has held that the "affecting substantial rights" inquiry is the same in both contexts, except for the question of who bears the risk of nonpersuasion. *See Olano*, 507 U.S. at 734 ("Rule 52(b) normally requires the same kind of [prejudice] inquiry [as Rule 52(a)], with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.").

760). Nevertheless, the Court has also "made clear that courts may sometimes make empirically based generalizations about what kinds of errors are likely, as a factual matter, to prove harmful," *Shinseki v. Sanders*, 556 U.S. at 411 (citations omitted) – or, as the *Kotteakos* Court put it, errors "[whose] natural effect is to prejudice a litigant's substantial rights." *Kotteakos*, 328 U.S. at 765 (internal quotation marks omitted); *see also id.* at 765-66 ("The only permissible presumption would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice in the particular setting."). "And by drawing upon 'experience' that reveals some such '"natural effect,"' a court might properly influence, though not control, future determinations." *Shinseki v. Sanders*, 556 U.S. at 411 (citing *Kotteakos*, 328 U.S. at 760-61).

The takeaway of *Kotteakos*, as viewed through the prism of *Shinseki v. Sanders*, is that any presumption of harm should be based upon empirical evidence and experience that the "natural effect" of a particular type of error is to affect substantial rights. *See Shinseki v. Sanders*, 556 U.S. at 411; *Kotteakos*, 328 U.S. at 765-66. Moreover, any such presumption should not be conclusive or irrebuttable, *see Shinseki v. Sanders*, 556 U.S. at 407, 411, because conclusive presumptions compel "courts to find an error harmful, when, in fact, in the particular case before the court, it is not." *Id.* at 408 (citations omitted). Finally, it is more acceptable to place the burden of demonstrating harmlessness on the Government in a criminal case

because "[i]n criminal cases the Government seeks to deprive an individual of his liberty, thereby providing a good reason to require the Government to explain why an error should not upset the trial court's determination." *Id.* at 410.

In sum, these cases support the proposition that, at least in a criminal case, a rebuttable presumption that an error affects substantial rights may be appropriate where the "natural effect" of that particular type of error is to affect substantial rights. As will be demonstrated, that is the "natural effect" of the type of error at issue in this case.

D. Under the Foregoing Principles, a Rebuttable Presumption of Prejudice Is Warranted Where a Clear Misapplication of the Sentencing Guidelines Results in a Defendant's Being Sentenced Under an Erroneously High Guideline Range.

1. Introduction.

As noted above, the Court has not, since *Olano*, returned to the subject of *Olano*'s second exception to the requirement of a specific showing of case-specific prejudice, namely, the exception for "errors that should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735. Nevertheless, the cases discussed above – especially *Olano* itself and *Kotteakos* – suggest that a rebuttable presumption of prejudice is appropriate in a criminal case where

(1) the "natural effect" of a particular type of error is to affect a defendant's substantial rights (*i.e.*, where empirical evidence and experience suggest that a particular type of error is, across the board, likely to have an effect on the outcome), *see Shinseki v. Sanders*, 556 U.S. at 411; *Kotteakos*, 328 U.S. at 765-66, and (2) the nature of the error makes it likely that "the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735.

Drawing the same conclusion, some federal courts of appeals have explicitly adopted a presumption of prejudice for a handful of errors where, in those courts' view, the "natural effect" of the error is to affect substantial rights, but the actual effect of the error in a given case is usually difficult to ascertain and prove.[11] Most relevant to the instant case, the Third and Tenth Circuits have explicitly applied a

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[11] The Third, Fifth, and Seventh Circuits have adopted a presumption of prejudice for forfeited claims that a defendant was denied his right to allocute at sentencing. *See United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007); *United States v. Reyna*, 358 F.3d 344, 350-52 (5th Cir. 2004) (*en banc*); *United States v. Adams*, 252 F.3d 276, 285-88 (3d Cir. 2001). The Third Circuit has adopted a presumption of prejudice for forfeited claims that the indictment was constructively amended. *See United States v. Syme*, 276 F.3d 131, 152-55 (3d Cir. 2002). And, in the wake of this Court's decision in *Booker*, which held the then-mandatory Sentencing Guidelines to be unconstitutional and remedied that unconstitutionality by rendering the Guidelines merely advisory, the Third and Sixth Circuits adopted a presumption of prejudice with respect to forfeited *Booker* claims. *See United States v. Davis*, 407 F.3d 162, 165 (3d Cir. 2005); *Barnett*, 398 F.3d at 526-29.

presumption of prejudice to forfeited claims of misapplications of the Guidelines. In *United States v. Knight*, 266 F.3d 203 (3d Cir. 2001), the Third Circuit held that "application of an incorrect guideline range resulting in a sentence that is also within the correct range [presumptively] affects substantial rights." *Id.* at 207; *see also id.* at 207-10. Likewise, in *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014), the Tenth Circuit explicitly adopted a rebuttable presumption that obvious Guideline errors affect a defendant's substantial rights. And, other circuits appear to implicitly apply the functional equivalent of such a presumption, albeit not couched in presumption-type terms.[12]

These decisions are correct. Because the "natural effect" of the application of an erroneous Guideline range is to affect substantial rights by skewing a defendant's sentence higher, and because the actual effect of such an error is typically difficult to discern and prove, the Court should adopt a rebuttable presumption that such an error has affected a

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[12] *See, e.g.*, *United States v. Bonilla-Guizar*, 729 F.3d 1179, 1188-89 (9th Cir. 2013); *United States v. Agyepong*, 312 Fed. Appx. 566, 568-69 (4th Cir. 2009) (unpublished); *United States v. Story*, 503 F.3d 436, 440-41 (6th Cir. 2007); *United States v. Wallace*, 32 F.3d 1171, 1174-75 (7th Cir. 1994); *United States v. Plaza-Garcia*, 914 F.2d 345, 347-48 (1st Cir. 1990) (Breyer, C.J.).

defendant's substantial rights, thus satisfying the third prong of the plain-error test.[13]

2. The "Natural Effect" of an Error in Calculating the Guidelines Is to Affect a Defendant's Sentence.

Although no longer mandatory, the United States Sentencing Guidelines still have a unique and surpassingly important role in federal sentencing, as this Court's post-*Booker* decisions confirm. This Court has said that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," *Gall v. United States*, 552 U.S. 38, 49 (2007) (citing *Rita v. United States*, 551 U.S. 338, 347-48 (2007)), because "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall*, 552 U.S. at 49. "[F]ailing to calculate (or improperly calculating) the Guidelines range" is a "significant procedural error." *Id.* at 51.

Moreover, "district courts must [not only] begin their analysis with the Guidelines [but also] remain cognizant of them throughout the sentencing process." *Id.* at 50 n.6. "If [the sentencing judge] decides

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[13] Although such a presumption will most often inure to the benefit of criminal defendants, it may occasionally be of assistance to the Government too, in cases where the Government raises, for the first time on appeal, a challenge to the calculation of the Guideline range. *See, e.g.*, *United States v. Gordon*, 291 F.3d 181, 190-95 (2d Cir. 2002).

that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation [from the Guidelines] and ensure that the justification is sufficiently compelling to support the degree of the variance," *id.* at 50, and "a major departure should be supported by a more significant justification than a minor one." *Id.*

The Court also confirmed the central importance of the Sentencing Guidelines in *Rita*. After describing the process by which the Guidelines were developed and are updated, *see Rita*, 551 U.S. at 347-50, the Court held that "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve [18 U.S.C.] § 3553(a)'s [sentencing] objectives." *Id.* at 350. The Court thus permitted appellate courts to adopt a nonbinding appellate presumption that sentences within the Guidelines are substantively reasonable, *see id.* at 347, in recognition of "the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id.* at 350-51. The Court conceded that it "m[ight] be correct that the presumption w[ould] encourage sentencing judges to impose Guidelines sentences," *id.* at 354, but held that, even so, this would not mean that the presumption was unconstitutional. *See id.*

As the Court has summarized, "[t]he post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored

by the Guidelines and that they remain a meaningful benchmark through the process of appellate review." *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013) (citation omitted). Moreover, the requirements described above "mean that in the usual sentencing, the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range." *Id.* (internal quotation marks, brackets, and citation omitted); *see also id.* at 2084 ("Common sense indicates that in general, this system will steer district courts to more within-Guidelines sentences."); *United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008) ("judges are more likely to sentence within the Guidelines in order to avoid the increased scrutiny that is likely to result from imposing a sentence outside the Guidelines") (citation omitted).

"Even if the sentencing judge sees a reason to vary from the Guidelines, 'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, ***then the Guidelines are in a real sense the basis for the sentence***.'" *Peugh*, 133 S. Ct. at 2083 (emphasis in original; citation omitted). Thus, "[e]ven when the district court ultimately decides to impose a sentence outside the Guidelines range, an error in its Guidelines calculation may still taint the non-Guidelines sentence. For instance, the district court might settle upon a particular non-Guidelines sentence by doubling the maximum Guidelines range, or by starting with the Guidelines range and adding or subtracting a fixed

number of years." *United States v. Ibarra-Luna*, 628 F.3d 712, 718 (5th Cir. 2010). After surveying Sentencing Commission data, one recent commentator has concluded that "even when judges depart [from the Guidelines], they appear to mentally begin with the Guidelines range and then adjust slightly upward or downward from there." Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. Chi. L. Rev. 901, 950 (2015) (footnote omitted).

In reaching its conclusions, the Court in *Peugh* found "considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges." *Peugh*, 133 S. Ct. at 2084. Although the Court was drawing upon 2011 data from the United States Sentencing Commission, its observations are still generally true under the latest data (2014) from the United States Sentencing Commission. It is still true, for example, that "district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion." *Id.* (citation omitted). In 2014, in only 23.6% of the cases did district courts impose above- or below-Guidelines sentences without a Government motion. *See* United States Sentencing Commission, *2014 Annual Report and 2014 Sourcebook of Federal Sentencing Statistics*, p. S-63 (Figure G). And, within-Guidelines sentences still comprise 46% of sentences imposed. *See id.* (In the Fifth Circuit, where this case arose, the percentage of

within-Guidelines sentences for fiscal year 2014 was 60.7%. *See id.*, p. S-56 (Table N-5).)[14]

All these considerations drove the Court's resolution of the issue in *Peugh*, which was whether a retrospectively increased Guideline range "present[ed] a sufficient risk of increasing the measure of punishment attached to the covered crimes," so as to constitute a violation of the *Ex Post Facto* Clause. *Peugh*, 133 S. Ct. at 2082 (internal quotation marks and citations omitted). The Court answered that question in the affirmative, concluding that because "[t]he federal system adopts procedural measures

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[14] In fiscal year 2014, sentencing appeals raising issues pertaining to the calculation of the Guideline range comprised 53.2% of the total of 4,521 sentencing appeals in that year. *See 2014 Annual Report and 2014 Sourcebook of Federal Sentencing Statistics*, p. S-147 (Table 59). Of the 2,405 appeals raising issues pertaining to the calculation of the Guideline range, 80.2%, or about 1,928, were affirmed, meaning, presumably, that only approximately 477 cases were remanded for resentencing with a different Guideline range. *See id.*

Petitioner is not aware of any publicly available data documenting how often a remand for resentencing under a different Guideline range results in a different sentence. However, petitioner has compiled in the appendix to this brief a list of 53 cases where (1) the case was remanded because of a Guideline calculation error, and (2) the correct Guideline range overlapped with the incorrect range (as in the instant case). The final outcomes in these cases at least anecdotally support the proposition that a lower Guideline range on remand generally results in a lower sentence. Of these 53 cases, 46 resulted in a lower sentence (86.79%); six resulted in the same sentence (11.32%); and one (a government plain-error appeal) resulted in a higher sentence (1.89%).

intended to make the Guidelines the lodestone of sentencing[, a] retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation." *Id.* at 2084.

In sum, the authorities discussed above, experience, and empirical evidence all confirm that, even post-*Booker*, "sentencing decisions are anchored by the Guidelines" *id.* at 2083, and that "the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges." *Id.* at 2084; *see also, e.g.*, *Turner*, 548 F.3d at 1099 ("Practically speaking, applicable Sentencing Guidelines provide a starting point or 'anchor' for judges and are likely to influence the sentences judges impose.") (citations omitted).[15]

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[15] The words "anchored" and "anchor" in the quoted language are significant, as some attribute district courts' continuing fealty to the Guidelines to be based in large part on the psychological phenomenon known as "anchoring." "Anchoring is overreliance on an initial numerical reference point that causes absolute judgments to assimilate toward the initial value." Daniel M. Isaacs, *Baseline Framing in Sentencing*, 121 Yale L. J. 426, 439 (2011) (internal quotation marks, brackets, and footnote omitted). Former United States District Judge Nancy Gertner has asserted that the Sentencing Guidelines "provid[e] ready-made anchors." Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 Yale L. J. Pocket Part 137, 138 (2006). And, United States District Judge Mark W. Bennett has observed that "[i]t is hardly surprising that the United States Sentencing Guidelines still act as a hulking anchor for most judges." Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 523 (2014) (footnote omitted); *see*

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"[T]he Guidelines continue to drive most federal sentences and bid fair to do so for years to come " Frank O. Bowman III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 Hous. L. Rev. 1227, 1270 (2014); *see also id.* at 1269 ("there is no reason to think that the Guidelines will not remain central to sentencing decisions indefinitely").

The Guidelines' continuing centrality and influence in federal sentencing provide compelling reasons for presuming that Guideline application errors affect a defendant's substantial rights. As the Third Circuit said as part of the justification for adopting just such a presumption, "it is beyond cavil that the Guidelines are intended to, and do, affect sentencing. Indeed, that is their very *raison d'être*." *Knight*, 266 F.3d at 207 (footnote omitted); *see also Sabillon-Umana*, 772 F.3d at 1333 (quoting this statement with approval in adopting such a presumption). "In the language of plain error's third prong, the whole point of the guidelines is to affect the defendant's 'substantial

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also United States v. Rushton, 738 F.3d 854, 861 (7th Cir. 2013) ("[T]he calculation of the defendant's guidelines sentencing range has what psychologists call an 'anchoring' effect. The calculation is likely to exert a not wholly conscious tug on the judge when he is deciding what sentence to give ") (citations omitted). *See generally* Isaacs, *supra*, at 429-43 (describing the cognitive phenomenon of "anchoring" when sentencing baselines are used) & 449 (suggesting that the "anchoring" effect of baselines like the United States Sentencing Guidelines is to steer sentencing judges toward "typical" [*i.e.*, Guideline] sentences).

rights' by guiding the district court's analysis of how much of his liberty he must forfeit to the government. When the court's starting point is skewed[,] a 'reasonable probability' exists that its final sentence is skewed too." *Sabillon-Umana*, 772 F.3d at 1333 (citations omitted). Put another way, as demonstrated by empirical evidence and experience, the "natural effect" of an erroneously high Guideline range is to skew the ultimate sentence higher than it otherwise would be. Accordingly, the Court should adopt a rebuttable presumption that such errors affect a defendant's substantial rights.

3. The Difficulty, in a Typical Case, of Demonstrating Case- and Fact-Specific Prejudice from an Error in Calculating the Guidelines Supports Adoption of a Rebuttable Presumption of Prejudice.

As discussed above, *Olano* suggests that a presumption of prejudice will be limited to the types of error for which it is likely that "the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735. Taking their cue from *Olano*, lower courts have held that another consideration in the decision whether to adopt a presumption of prejudice is whether "the inherent nature of the error ma[k]e[s] it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred." *Barnett*, 398 F.3d at 526-27 "[C]ourts have

been willing to presume prejudice, both implicitly and explicitly, in plain error review of errors that, by their nature, keep the party from being able to demonstrate that, in the absence of that error, the outcome of his trial or sentence would have been different." *Id.* at 527

The use of an erroneous Guideline range is one of this limited class of errors. "[A]bsent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the impact of an erroneous Guidelines range." *Knight*, 266 F.3d at 207. This difficulty is the result of a key feature of federal sentencing law, namely: that within-Guidelines sentences have been held to require little or no explanation.

The notion that a within-Guidelines sentence will often require very little explanation was confirmed by this Court in *Rita*, when the Court said that

> when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the [Sentencing] Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of [18 U.S.C.] § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under § 3553(a) – that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat

> certain defendant characteristics in the proper way – or argues for departure, the judge normally need say no more.

Rita, 551 U.S. at 356-57 (citation omitted).

The federal circuits have likewise validated the idea that within-Guidelines sentences require little or no explanation. Even though a federal sentencing court is directed to "state in open court the reasons for its imposition of the particular sentence," 18 U.S.C. § 3553(c), federal circuits prior to *Booker* found this requirement satisfied "when the court indicate[d] the applicable guideline range and how it [was] chosen,"[16] *United States v. Reyes-Lugo*, 238 F.3d 305, 310 (5th Cir. 2001) (citing *United States v. Georgiadis*, 933 F.2d 1219, 1222-23 (3d Cir. 1991)); *accord, e.g.*, *United States v. James*, 280 F.3d 206, 208 (2d Cir. 2002); *United States v. Strozier*, 981 F.2d 281, 282 n.1 (7th Cir. 1992). It does not appear that this minimal explanation requirement has changed

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[16] Under 18 U.S.C. § 3553(c)(1), a more exacting explanation is required when the "spread" of the Guideline range (from minimum to maximum) "exceeds 24 months"; in such a case, the sentencing court must state "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. § 3553(c)(1). However, § 3553(c)(1) does not apply at all to the large part of the Guidelines table setting out ranges that are 24 months or less in spread. Moreover, even where § 3553(c)(1) applies, its enhanced explanation requirement may be honored more in the breach than in the observance. *See, e.g.*, *United States v. Reyna*, 54 Fed. Appx. 412 (5th Cir. 2002) (unpublished) (violation of § 3553(c)(1) did not require reversal of sentence on plain-error review).

post-*Booker*. *See, e.g.*, *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1199-1203 (10th Cir. 2007). Indeed, the Fifth Circuit has specifically held that "[w]hen the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required." *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005); *see also United States v. Newsom*, 428 F.3d 685, 688 (7th Cir. 2005) (same; relying on *Mares*).

Thus, federal district courts have been told, loud and clear, that sentences within the Guideline range generally require little or no explanation – and, as this very case illustrates, that message has not been lost on the district courts. Here the District Court simply adopted the PSR and then imposed a prison sentence of 77 months (the bottom of the range as calculated in the PSR), with no further explanation. (J.A. 33)

The instant case therefore illustrates why, in light of the minimal explanation requirement, a presumption of prejudice is necessary as a practical matter. Before the Fifth Circuit, petitioner argued that, even without a presumption of prejudice, the record established an effect on his substantial rights because: (1) the parties' arguments all focused on the erroneous Guideline imprisonment range; (2) the district court rejected the Government's recommendation for the high end of the erroneous range (96 months); and (3) the district court instead selected

the very bottom of the erroneous range (77 months).[17] (J.A. 48-49)

The Fifth Circuit disagreed. (J.A. 48-49) But, if the circumstantial evidence in this case did not suffice to establish an effect on substantial rights, it is unclear what would suffice other than an explanation by the district court of its reasoning behind its selection of the 77-month sentence imposed – an explanation that the district court was not legally compelled to give.

As this case well shows, "absent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the impact of an erroneous Guidelines range." *Knight*, 266 F.3d at 207. Consequently, in the typical case, "it would be exceedingly difficult for a defendant, such as [petitioner], to show that his sentence would have been different if the district court had sentenced him under [the correct Guideline range]." *Barnett*, 398 F.3d at 528. This difficulty, coupled with the high likelihood that the Guideline range does affect the sentence, makes this "an appropriate case in which to presume prejudice under [this] Court's decision in *Olano*." *Id.* at 527-28.

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[17] Indeed, as laid out in Section H below, petitioner continues to contend that, even without a presumption, this circumstantial evidence does establish the requisite effect on substantial rights. Accordingly, even if the Court does not agree that a presumption of prejudice should apply to this type of error, petitioner requests that the Court nonetheless still reverse the judgment of the Fifth Circuit.

"Both of these factors [] support [the] recognition of presumptive prejudice from application of the wrong Guidelines range." *Knight*, 266 F.3d at 207 Accordingly, "an error in application of the Guidelines that results in use of a higher sentencing range should be presumed to affect the defendant's substantial rights." *Id.*

E. A Rebuttable Presumption Will Not Inflexibly Require Remand for Undeserving Cases.

It is highly significant that the proposed presumption is ***rebuttable***. Unlike the mandatory, or conclusive, presumption of harm condemned by the Court in *Shinseki v. Sanders*, a rebuttable presumption of prejudice in this context would not prevent an appellate court from finding an error harmless "on the facts and circumstances of the particular case" or "require the reviewing court to find the [] error prejudicial even if that court, having read the entire record, conscientiously concludes the contrary." *Shinseki v. Sanders*, 556 U.S. at 408. And, it certainly would not require remand where it is "obvious from the record in the particular case that the error made no difference." *Id.* at 407

As the Tenth Circuit has written,

> presumptions can be overcome and the presumption that obvious guidelines errors meet the [third prong] of the plain error test can be too. In some cases, the record will reveal a

> "fortuitous comment" from the sentencing judge making clear that its error in applying the guidelines didn't adversely affect the defendant's ultimate sentence. *Knight*, 266 F.3d at 207 For example, a district judge might proceed to analyze a case under alternative theories – one permissible, the other obviously mistaken – and arrive at the same sentencing conclusion either way.

Sabillon-Umana, 772 F.3d at 1334. Indeed, the jurisprudence contains numerous instances where courts of appeals have been able to affirmatively conclude that the use of an erroneous Guideline range was nonetheless harmless.[18]

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[18] *See, e.g.*, *United States v. Jimenez Piña*, 605 Fed. Appx. 150, 152 (4th Cir.) (unpublished), *cert. denied*, ___ U.S. ___, 2015 WL 3883581 (Oct. 5, 2015) (any error in calculating Guideline range did not affect defendant's substantial rights where district court "departed below the Guidelines to the statutory minimum sentence, the lowest sentence it could impose"); *United States v. Zabielski*, 711 F.3d 381, 388-89 (3d Cir. 2013) (any error in calculation of Guideline range was harmless where district court varied downward to a 24-month sentence, which was below even the arguably correct range, and the record showed that the Guidelines had no real bearing on the district court's selection of sentence); *United States v. Pantle*, 637 F.3d 1172, 1177-78 (11th Cir. 2011) (any error in calculation of Guideline range did not affect defendant's substantial rights, and was harmless, where district court stated that it believed that 120-month statutory maximum sentence was not long enough for defendant's crime); *United States v. Knight*, 606 F.3d 171, 179-80 (4th Cir. 2010) (any error in calculation of Guideline range was harmless where district court varied downward to a 60-month sentence, which was below even the arguably correct range, and the record

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In sum, making the proposed presumption of prejudice in this context rebuttable ensures that sentencing hearings do not become "impregnable citadels of technicality," *Kotteakos*, 328 U.S. at 759 (footnote omitted), leading to "wasteful reversals." *Dominguez Benitez*, 542 U.S. at 82. Rather, because the proposed presumption is rebuttable, it will "properly influence, though not control, future determinations" of the third prong of the plain-error test in the limited context of erroneous Guideline ranges. *Shinseki v. Sanders*, 556 U.S. at 411 (citation omitted).

F. A Rebuttable Presumption of Prejudice for Errors of this Type Has Substantial Benefits.

A presumption of prejudice for undisputed errors resulting in the application of an erroneous Guideline range has several benefits. First, the presumption will further the goal of remedying the profound injustice resulting from the imposition of a longer term of imprisonment than the district court would have imposed under the correct Guideline range. As the Tenth Circuit has said, "we can think of few things that affect an individual's substantial rights more than a reasonable probability [that] an individual will linger longer in prison than the law demands only

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showed that the Guidelines had no real bearing on the district court's selection of sentence because the district court believed that at least a 60-month sentence was necessary to make sure defendant received necessary rehabilitative training).

because of an obvious judicial mistake." *Sabillon-Umana*, 772 F.3d at 1335. In addition, there are significant savings to the public fisc resulting from the trimming of excessive months or years from a prisoner's sentence.[19]

A presumption that an erroneous Guideline range affected a defendant's sentence also ensures that appellate courts do not usurp the institutional role of the district court. The duty of sentencing falls upon the district court, not the appellate court, and for good reasons:

> The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record. The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.

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[19] According to the Administrative Office of the United States Courts, in fiscal year 2014, the average annual cost to imprison a person after sentencing was $30,621, or $2,551.75 a month – almost eight times the cost of post-release supervision. United States Courts Website, "Did You Know? Imprisonment Costs 8 [T]imes More Than Supervision" (June 18, 2015), available at http://www.uscourts.gov/news/2015/06/18/did-you-know-imprisonment-costs-8-times-more-supervision (last visited Nov. 6, 2015).

Gall, 552 U.S. at 51-52 (internal quotation marks, brackets, and citations omitted).

Given the primacy of the district court's role in sentencing, appellate courts should not speculate that a different Guideline range – one of the factors the district court is mandated to consider in passing sentence, *see* 18 U.S.C. § 3553(a)(4) – would have made no difference. As the Third Circuit has held,

> [w]here we conclude that the District Court might have ended up with a different sentence had it started at the right point, giving the [District] Court the opportunity to reconsider the sentence and start at the right place in resentencing actually affords deference and respect for the District Court judge. Our failure to do so would be presumptuous on our part: it is not our role to say that the sentencing judge would consider the sentence he gave, which was at the low end of the incorrectly calculated range, to be appropriate when the correct Guideline range is lower than was assumed.

United States v. Langford, 516 F.3d 205, 220 (3d Cir. 2008).[20] Just so: unless it can be said with assurance that the use of an erroneous Guideline range had no effect on the district court's decision, it is more

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[20] "Moreover," pointed out the Third Circuit, "insisting on a uniform point of departure from which all sentencing courts can exercise their discretion promotes uniformity in the sentencing of defendants with similar criminal history and offense levels." *Langford*, 516 F.3d at 220.

respectful of the district court's role as the sentencing body to allow the district court to reevaluate the sentence in light of the correct Guideline range.

Finally, correction of undisputed errors promotes better development of the Guidelines. As the Court observed in *Rita*, "[t]he [Sentencing] Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." *Rita*, 551 U.S. at 350. "The Commission will collect and examine the results [of these courts' work] . . . [a]nd it can revise the Guidelines accordingly." *Id.* (citations omitted). Allowing district courts to reassess a defendant's sentence in light of the correct Guideline range will result in a sentence that is a better data-point for the Sentencing Commission when it determines how the Guidelines should be amended.

G. A Rebuttable Presumption of Prejudice for this Limited Class of Errors Will Not Compromise the Interests Protected by the Contemporaneous-Objection Rule.

Any relaxation of the requirements for securing plain-error relief potentially raises the concerns animating the contemporaneous-objection rule, namely: (1) the burden and cost of corrective proceedings, and (2) the increased possibility of "sandbagging," *i.e.*, strategically withholding an objection in the district court as an "ace in the hole" for appeal in case things

do not turn out as the party wants. *See generally Puckett*, 556 U.S. at 134 (discussing these concerns). As will be demonstrated, however, neither of these concerns would follow from adopting a rebuttable presumption of prejudice for the limited class of error discussed here.

First, it is generally acknowledged that the burden and cost of remanding a case for resentencing is relatively modest, particularly in comparison to the burden and cost of reversing a conviction. "[T]he cost of correcting a sentencing error is far less than the cost of a retrial. A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005); *see also Barnett*, 398 F.3d at 533 (Gwin, J., concurring) ("By contrast [with a retrial], where a re-sentencing is at issue, the costs are far less.") (citation omitted). "[T]here is little reason not to correct plain sentencing errors when doing so is so simple a task. Reversing a sentence does not require that a defendant be released or retried, but simply allows a district court to exercise properly its authority to impose a legally appropriate sentence." *United States v. Joseph*, 716 F.3d 1273, 1281 (9th Cir. 2013) (internal quotation marks and citations omitted).

Moreover, a new sentencing hearing will not always have to be held at all. If the parties are in

agreement as to the new sentence, the defendant can waive his rights to presence[21] and allocution,[22] and then resentencing can occur simply "on the papers" by motion and entry of a new judgment. *See Sabillon-Umana*, 772 F.3d at 1334 ("knowing that obvious guidelines errors are presumptively subject to correction should enable the parties to agree to their prompt resolution in the district court without the necessity of a lengthy appeal like the one before us") (footnote omitted). And, even if the result of a remand is a full resentencing, there is generally no risk of unavailability of witnesses or evidence, since reliable hearsay is fully admissible at a sentencing hearing. In sum, the modest cost of a resentencing proceeding is more than outweighed by the benefits of having the district court reweigh its sentence in light of the correct Guideline range.[23]

With respect to the second concern about "sandbagging," the proposed rebuttable presumption would not provide defendants with an incentive to withhold an objection to Guideline calculation error in the district court. In light of the well-documented "anchoring"

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[21] *See, e.g., United States v. DeValle*, 894 F.2d 133, 137 (5th Cir. 1990); *United States v. Brown*, 456 F.2d 1112, 1114 (5th Cir. 1972).

[22] *See, e.g., United States v. Washington*, 44 F.3d 1271, 1276-77 (5th Cir. 1995); *United States v. De La Paz*, 698 F.2d 695, 697 (5th Cir. 1983).

[23] Additionally, as discussed above, where the sentence is reduced on remand, there are significant offsetting cost-savings. *See supra* at 46 & n.19.

effect of the Sentencing Guidelines, it always behooves a defendant – even one who is hoping for a downward departure or a variance – to start the sentencing process with as low a Guideline range as possible. Consequently, "it is unlikely that a defendant would purposely withhold an argument that would provide him with a lower Guidelines sentence," Ferguson, *supra*, at 325, because there is no obvious strategic benefit from doing so. As the Court said in a slightly different context, "[i]f there is a lawyer who would deliberately forgo objection ***now*** because he perceives some slightly expanded chance to argue for 'plain error' ***later***, [one] suspect[s] that, like the unicorn, he finds his home in the imagination, not the courtroom." *Henderson v. United States*, 133 S. Ct. 1121, 1129 (2013) (emphasis in original).

Indeed, it seems likely that, at least in this limited context, the failure to object almost always results from inadvertence – simply overlooking the error – rather than a strategic choice to forgo objection. In this case, that conclusion is bolstered by the fact that almost everyone involved – district-court counsel, the Government, the Probation Office, the District Court, and, initially, even appellate counsel – missed a clear misapplication of the Guidelines.

In a recent case, the Seventh Circuit described a similar plain-error scenario as "a thoroughly botched sentencing in which the parties, the probation service, and the sentencing judge are all implicated." *United States v. Rushton*, 738 F.3d 854, 860 (7th Cir. 2013). But, said the Seventh Circuit, "[w]e can't

blame any of them too harshly, because the sentencing guidelines are absurdly complex."[24] *Id.* The Seventh Circuit concluded that, nonetheless, "the remedy is not speculation about what the judge would have done had he calculated the sentencing range accurately; it is a resentencing from scratch . . ." *Id.* (citations omitted). A rebuttable presumption of prejudice facilitates that remedy, without providing any real disincentive to object below.

Finally, adoption of a rebuttable presumption of prejudice will not mean that the use of an erroneous Guidelines range will inevitably result in remand. Even if the Government is unable to rebut the presumption of prejudice in a given case, the appellate court retains its discretion under the fourth prong of

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[24] As early as 2002, Professor Douglas A. Berman noted the judicial and academic complaints about the complexity of the Guidelines, *see* Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 Iowa L. Rev. 435, 444 & nn.37-38 (2002); and he expressed the fear that the complexity of the Guidelines and interpretive case law created "significant challenges and burdens" for defense counsel, *id.* at 444-45, "as well as the serious risk that differences in the knowledge, experiences, and resources of defense counsel will produce significant variation in Guidelines sentencing outcomes." *Id.* at 445. Professor Berman quoted the former Federal Public Defender for the District of Massachusetts as saying that the Guidelines' "massive infusion of rules of law into the sentencing process" had created for defense attorneys "multifarious opportunities for mistakes and malpractice." *Id.* (ellipsis in original; internal quotation marks omitted). Since 2002, these concerns have only become more acute.

plain-error review, and can decline to exercise that discretion where, for some unusual reason, a remand would not vindicate the "fairness, integrity or public reputation of judicial proceedings." *Cf. Henderson*, 133 S. Ct. at 1130 (observing that fourth prong helps screen out undeserving candidates for plain-error reversal).

H. In the Alternative, even if the Court Does Not Agree that a Presumption of Prejudice Should Apply to the Error in this Case, the Court Should Hold that, on the Facts of this Case, Petitioner Has Shown the Requisite Effect on his Substantial Rights.

The Fifth Circuit, consistent with its precedent, declined to apply a presumption of prejudice in this case. (J.A. 47 n.1) If this Court agrees that such a presumption should apply, then the Court should reverse the judgment below and remand for application of that presumption and further proceedings consistent therewith.

In the alternative, even if the Court does not adopt such a presumption, the Court should hold that petitioner nevertheless met his burden of establishing an effect on his substantial rights, because the record shows at least a reasonable probability that the sentence would be lower under the correct Guideline range. The Probation Office recommended the bottom of the incorrect range, specifically noting that it was "the low-end of the applicable custody guideline

range." *See* Sentencing Recommendation, at 1.[25] The parties' arguments as to the appropriate sentence focused on the Guideline imprisonment range. (J.A. 30-32) Significantly, although the Government urged the District Court to sentence petitioner to 96 months' imprisonment (the top of the Guideline imprisonment range calculated by the PSR) (J.A. 30-31), the District Court rejected that request and instead sentenced petitioner to 77 months' imprisonment, the bottom of the Guideline imprisonment range calculated by the PSR.[26] (J.A. 33, 38)

Under all these circumstances, there is at least a "reasonable probability" that, but for the error, the outcome of the proceeding would have been different, *see Dominguez Benitez*, 542 U.S. at 82-83; or, put another way, under these circumstances "the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Id.* at 83 (citations omitted). Accordingly, even without a presumption, the Court should reverse the Fifth Circuit's judgment, and remand for further consideration of petitioner's case.

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[25] Although the Probation Office's recommendation is typically filed under seal (as it is in this case), the District Judge presiding in this case makes the recommendation available to the parties.

[26] Statistically, 49.8% of within-Guidelines sentences are at the very bottom of the range; and 72% of within-Guidelines sentences are at the bottom of the range or in the lower half of the range. *See 2014 Annual Report and 2014 Sourcebook of Federal Sentencing Statistics*, p. S-85 (Table 29).

I. Summary.

In summary, in the unique context of an obvious misapplication of the Sentencing Guidelines resulting in the application of an erroneous Guideline range, the relevant considerations all favor adoption of a rebuttable presumption that the error affected the defendant's substantial rights. As Judge Gorsuch has written for the Tenth Circuit, a rebuttable presumption that obvious misapplications of the Guidelines affect a defendant's substantial rights is "sound," *Sabillon-Umana*, 772 F.3d at 1333, "sensible[,] and consistent" with plain-error doctrine and the interpretive case law. *Id.* at 1334. The Court should adopt such a presumption, reverse the Fifth Circuit's judgment, and remand for further consideration of petitioner's case in light of this presumption. In the alternative, even if the Court does not adopt such a presumption, the Court should hold that petitioner nevertheless met his burden of establishing an effect on his substantial rights, reverse the Fifth Circuit's judgment, and remand for further consideration of petitioner's case.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
SOUTHERN DISTRICT OF TEXAS
TIMOTHY CROOKS*
LAURA FLETCHER LEAVITT
Assistant Federal Public Defenders
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
(713) 718-4600
tim_crooks@fd.org
Counsel for Petitioner

**Counsel of Record*

PLAIN-ERROR REVERSALS FOR GUIDELINE CALCULATION ERRORS THAT RESULTED IN OVERLAPPING CORRECT AND INCORRECT RANGES[1]

[1] This compilation contains a list, broken down by circuit, of only those cases that involved an error in the calculation of the Guideline imprisonment range that resulted in an overlap between the correct and incorrect Guideline ranges. The compilation does not contain cases from the Fifth Circuit (the circuit from which the instant case arose) or from the District of Columbia Circuit (from which no cases were found). There may be cases not captured by the general electronic-database search that was conducted. This list does not include cases involving remands of sentences imposed upon revocation of probation or supervised release, cases for which the standard of review was not clear, or cases lacking adequate information about the Guideline calculations.

FIRST CIRCUIT

Case	Incorrect Range *Original Sentence*	Correct Range *Sentence on Remand*
U.S. v. Ortiz, 741 F.3d 288 (1st Cir. 2014)	21-27 months *36 months*	15-21 months *30 months*[2]
U.S. v. Correy, 570 F.3d 373 (1st Cir. 2009) (Def. Flores-Plaza)	292-365 months *292 months*	235-293 months *time served*[3]
U.S. v. Altagracia Castillo, 145 Fed. Appx. 683 (1st Cir. 2005) (unpub.)	210-262 months *210 months*	168-210 months *168 months*
U.S. v. Sedoma, 332 F.3d 20 (1st Cir. 2003)	235-293 months *293 months (293 + 60 concurrent)*	188-235 months *235 months (235 + 60 consecutive)*

[2] On remand for resentencing, docket sheet reflects that district court said that it was "not using the GSR [Guideline sentencing range] as a starting point."

[3] Defendant was indicted in 1995, originally sentenced in 2002, and resentenced in 2012. It is not clear when defendant was incarcerated. He was on bond pending trial and may have been imprisoned either upon finding of guilt in 1999 or upon sentencing in 2002. Time served was probably anywhere from 13 to 16 years (on an original sentence of just over 24 years).

SECOND CIRCUIT

Case	Incorrect Range *Original Sentence*	Correct Range *Sentence on Remand*
U.S. v. McCrimon, 788 F.3d 75 (2d Cir. 2015)	63-78 months *63 months*	51-63 months *51 months*
U.S. v. Candelario, 486 Fed. Appx. 907 (2d Cir. 2012) (unpub.) (Def. Carter)	140-175 months *175 months*	130-162 months *135 months*
U.S. v. Keigue, 318 F.3d 437 (2d Cir. 2003)	12-18 months *15 months (concurrent)*	10-16 months *15 months (concurrent)*
U.S. v. Pavlotskiy, 47 Fed. Appx. 590 (2d Cir. 2002) (unpub.)	37-46 months *46 months*	33-41 months *41 months*
U.S. v. Gordon, 291 F.3d 181 (2d Cir. 2002) (Gov't appeal)	97-121 months *97 months (concurrent)*	108-135 months or 121-151 months *108 months (concurrent)*

THIRD CIRCUIT

Case	Incorrect Range *Original Sentence*	Correct Range *Sentence on Remand*
U.S. v. Tai, 750 F.3d 309 (3d Cir. 2014)	70-87 months (variance from 87-108 months) *72 months (concurrent)*	57-71 months (if same variance applied) *66 months (concurrent)*
U.S. v. Porter, 413 Fed. Appx. 526 (3d Cir. 2011) (unpub.)	33-41 months *35 months*	27-33 months *24 months*
U.S. v. Irvin, 369 F.3d 284 (3d Cir. 2004)	63-78 months *72 months*	57-71 months *time served*[4]
U.S. v. Knight, 266 F.3d 203 (3d Cir. 2001)	151-188 months *162 months*	140-175 months *140 months*
U.S. v. Knobloch, 131 F.3d 366 (3d Cir. 1997)	87-108 months *87 months*[5]	70-87 months *30 months*[6]

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[4] Defendant was on bond until either his guilty plea (02/25/2000) or sentencing (06/12/2000). Time served therefore was probably either a few months short of, or just a little more than, five years of imprisonment (on an original 72-month – or six-year – prison sentence).

[5] Total original sentence with 60-month consecutive sentence was 147 months.

[6] Total sentence on remand was 55 months with 25-month consecutive sentence.

FOURTH CIRCUIT

Case	Incorrect Range *Original Sentence*	Correct Range *Sentence on Remand*
U.S. v. Wallace, 403 Fed. Appx. 868 (4th Cir. 2010) (unpub.)	24-30 months *30 months*[7]	18-24 months *24 months*[8]
U.S. v. Taylor, 374 Fed. Appx. 392 (4th Cir. 2010) (unpub.)	37-46 months *46 months*[9]	30-37 months *37 months*[10]
U.S. v. Hardy, 322 Fed. Appx. 298 (4th Cir. 2009) (unpub.)	100-125 months *125 months (concurrent)*[11]	87-108 months *108 months (concurrent)*[12]

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[7] Total original sentence with 24-month consecutive sentence was 54 months.

[8] Total sentence on remand with 24-month consecutive sentence was 48 months.

[9] Total original sentence with 24-month consecutive sentence was 70 months.

[10] Total sentence on remand with 24-month consecutive sentence was 61 months.

[11] Total original sentence with 60-month consecutive sentence was 185 months.

[12] Total sentence on remand with 60-month consecutive sentence was 168 months.

U.S. v. Agyepong, 312 Fed. Appx. 566 (4th Cir. 2009) (unpub.)	15-[21] months *15 months*[13]	12-18 months *12 months*[14]
U.S. v. Sanson, 85 Fed. Appx. 967 (4th Cir. 2004) (unpub.)	78-97 months *97 months*	70-87 months *60 months*
U.S. v. Moreno, 67 Fed. Appx. 161 (4th Cir. 2003) (unpub.)	188-235 months *220 months*	151-188 months *168 months*
U.S. v. Williams, 25 Fed. Appx. 175 (4th Cir. 2002) (unpub.)	24-30 months *30 months*	18-24 months *24 months*
U.S. v. Hawkins, 232 F.3d 891 (4th Cir. 2000) (table) (unpub.)	210-262 months *210 months*	188-235 months *188 months*
U.S. v. Windley, 217 F.3d 843 (4th Cir. 2000) (table) (unpub.)	188-235 months *188 months*	151-188 months *70 months*

[13] Total original sentence with 24-month consecutive sentence was 39 months.

[14] Total sentence on remand with 24-month consecutive sentence was 36 months.

U.S. v. Livingston, 21 F.3d 446 (4th Cir. 1994) (table) (unpub.)	92-115 months *92 months*[15]	77-96 months *77 months*[16]

[15] Total original sentence with 60-month consecutive sentence was 152 months.

[16] Total sentence on remand with 60-month consecutive sentence was 137 months.

SIXTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Baker, 559 F.3d 443 (6th Cir. 2009)	262-327 months *300 months*	235-293 months *200 months*
U.S. v. Lee, 288 Fed. Appx. 264 (6th Cir. 2008) (unpub.)	15-21 months *27 months (concurrent)*	12-18 months *24 months (concurrent)*
U.S. v. Story, 503 F.3d 436 (6th Cir. 2007)	346-405 months *300 months (concurrent)*	324-405 months *240 months (concurrent)*
U.S. v. Davis, 397 F.3d 340 (6th Cir. 2005)	33-41 months *33 months (concurrent)*	24-30 months or 30-37 months *1 day (concurrent)*
U.S. v. Johnson, 103 Fed. Appx. 866 (6th Cir. 2004) (Def. Byrd) (GVR on other grounds)	12-18 months *18 months*	4-10 months *10 months – time served*

SEVENTH CIRCUIT

Case	Incorrect Range *Original Sentence*	Correct Range *Sentence on Remand*
U.S. v. Jenkins, 772 F.3d 1092 (7th Cir. 2014)	168-210 months *168 months*	135-168 months *135 months*
U.S. v. Williams, 742 F.3d 304 (7th Cir. 2014)	37-46 months *56 months (concurrent)*[17]	30-37 months *56 months (concurrent)*[18]
U.S. v. Doss, 741 F.3d 763 (7th Cir. 2013)	63-78 months *78 months (concurrent)*[19]	51-63 months *44 months (concurrent)*[20]
U.S. v. Garcia-Hernandez, 464 Fed. Appx. 535 (7th Cir. 2012) (unpub.)	46-57 months *57 months*	37-46 months *37 months*
U.S. v. Avila, 557 F.3d 809 (7th Cir. 2009)	324-405 months *396 months*	262-327 months *365 months*

[17] Total original sentence with 24-month consecutive sentence was 80 months.

[18] Total sentence on remand with 24-month consecutive sentence was 80 months.

[19] Total original sentence with 24-month consecutive sentence was 102 months.

[20] Total sentence on remand with 24-month consecutive sentence was 68 months.

U.S. v. Garrett, 528 F.3d 525 (7th Cir. 2008)	168-210 months *189 months*	151-188 months *121 months*
U.S. v. Ghosh, 190 Fed. Appx. 484 (7th Cir. 2006) (unpub.)	18-24 months *21 months (concurrent)*	15-21 months *21 months – time served (concurrent)*
U.S. v. Wallace, 32 F.3d 1171 (7th Cir. 1994)	168-210 months *168 months (concurrent)*	151-188 months *121 months (concurrent)*

EIGHTH CIRCUIT

Case	Incorrect Range *Original Sentence*	Correct Range *Sentence on Remand*
U.S. v. Grandison, 781 F.3d 987 (8th Cir. 2015)	360 months-life *360 months*	292-365 months *300 months*
U.S. v. Plancarte-Vasquez, 450 F.3d 848 (8th Cir. 2006) (Def. Plancarte-Vasquez)	168-210 months *168 months (concurrent)*	135-168 months *168 months (concurrent)*
U.S. v. Weaver, 161 F.3d 528 (8th Cir. 1998)	120-150 months *120 months (concurrent)*	110-137 months *80 months (concurrent)*

NINTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Vargem, 747 F.3d 724 (9th Cir. 2014)	70-87 months *30 months (concurrent)*	57-71 months *30 months (concurrent)*
U.S. v. Bonilla-Guizar, 729 F.3d 1179 (9th Cir. 2013)	Def. 1: 188-235 months *188 months (concurrent)* Def. 2: 210-262 months *188 months (concurrent)*	121-151 months *144 months (concurrent)* 168-210 months *144 months (concurrent)*
U.S. v. Dietz, 360 Fed. Appx. 946 (9th Cir. 2010) (unpub.)	210-262 months *196 months (concurrent)*	188-235 months *174 months (concurrent)*
U.S. v. Mejia, 559 F.3d 1113 (9th Cir. 2009)	188-235 months *188 months (concurrent)*	168-210 months *160 months (concurrent)*
U.S. v. Lee, 308 Fed. Appx. 81 (9th Cir. 2009) (unpub.)	235-293 months *235 months (concurrent)*	210-262 months *210 months (concurrent)*
U.S. v. Ysassi, 282 Fed. Appx. 588 (9th Cir. 2008) (unpub.)	100-125 months *125 months (concurrent)*	92-115 months *115 months (concurrent)*

TENTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Chapple, 198 Fed. Appx. 745 (10th Cir. 2006) (unpub.)	27-33 months *33 months (concurrent)*	21-27 months *33 months (concurrent)*

ELEVENTH CIRCUIT

Case	**Incorrect Range** ***Original Sentence***	**Correct Range** ***Sentence on Remand***
U.S. v. Perez, 572 Fed. Appx. 787 (11th Cir. 2014) (unpub.)	262-327 months *300 months*	235-293 months *293 months*
U.S. v. Bryant, 398 Fed. Appx. 561 (11th Cir. 2010) (unpub.)	151-188 months *151 months*	121-151 months *120 months*
U.S. v. Frazier, 605 F.3d 1271 (11th Cir. 2010) (Def. Roach)	108-135 months *135 months (concurrent)*	97-121 months *121 months (concurrent)*
U.S. v. Barrera-Cruz, 347 Fed. Appx. 475 (11th Cir. 2009) (unpub.)	30-37 months *30 months*	18-24 months *21 months*

U.S. v. Bennett, 472 F.3d 825 (11th Cir. 2006)	210-262 months *220 months*	188-235 months *194 months*
U.S. v. Oddo, 133 Fed. Appx. 632 (11th Cir. 2005) (unpub.)	15-21 months *17 months*	10-16 months *time served*[21]

[21] Defendant was on bond until his surrender date (06/18/2004). Time served until resentencing (06/28/2005) was probably slightly over one year.

Supreme Court, U.S.
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No. 14-8913

In the Supreme Court of the United States

SAUL MOLINA-MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SCOTT A.C. MEISLER
Assistant to the Solicitor General
JENNY C. ELLICKSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in conducting plain-error review under Federal Rule of Criminal Procedure 52(b), a court of appeals should presume that an error in calculating a defendant's advisory Sentencing Guidelines range affected the defendant's substantial rights.

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In the Supreme Court of the United States

No. 14-8913

SAUL MOLINA-MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 45-49) is not published in the Federal Reporter but is reprinted at 588 Fed. Appx. 333.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2014. The petition for a writ of certiorari was filed on March 16, 2015, and was granted on October 1, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES AND SENTENCING GUIDELINES INVOLVED

The pertinent statute, rules and Sentencing Guidelines provisions are reproduced in an appendix to this brief, App. A, *infra*, 1a-10a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, peti-

tioner was convicted of being unlawfully present in the United States after having been deported following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). J.A. 36. He was sentenced to 77 months of imprisonment, to be followed by three years of supervised release. J.A. 38-39. The court of appeals affirmed. J.A. 45-49.

A. Statutory Background

Federal sentencing is governed by the overarching principle in 18 U.S.C. 3553(a) that the district court must impose a sentence "sufficient, but not greater than necessary," to serve the statutory purposes of sentencing. "[T]he starting point and the initial benchmark" at sentencing is the calculation of a range under the federal Sentencing Guidelines. *Gall* v. *United States*, 552 U.S. 38, 49 (2008). Although the Guidelines are now advisory, not mandatory, *United States* v. *Booker*, 543 U.S. 220, 234 (2005), the district court must consider the Guidelines range along with the other factors in Section 3553(a) before imposing sentence. *Peugh* v. *United States*, 133 S. Ct. 2072, 2080 (2013).

In calculating the advisory range, "[t]he sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines." *Rita* v. *United States*, 551 U.S. 338, 351 (2007); see 18 U.S.C. 3552(a). Timely objections to that interpretation are central to the "focused, adversarial resolution" of sentencing disputes contemplated by the Federal Rules of Criminal Procedure. See *Burns* v. *United States*, 501 U.S. 129, 137 (1991). Under Federal Rule of Criminal Procedure 32, the parties receive copies of the presentence report (PSR) at least 35 days before the sentencing

hearing and then have 14 days to submit objections to the PSR's factual findings and sentencing recommendations. Fed. R. Crim. P. 32(e)(2) and (f)(1). At least seven days before sentencing, the probation officer must submit a final version of the PSR and an addendum stating any unresolved objections. Fed. R. Crim. P. 32(g). As late as the sentencing hearing, a party may still be permitted, "for good cause," "to make a new objection" to the Guidelines calculations or other matters. Fed. R. Crim. P. 32(i)(1)(D). At the hearing, the parties must be allowed to comment on "matters relating to an appropriate sentence," Fed. R. Crim. P. 32(i)(1)(C), and if portions of the PSR remain in dispute, the district court must "rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing," Fed. R. Crim. P. 32(i)(3)(B).

B. The Present Controversy

1. On August 31, 2012, United States Customs and Border Protection agents located petitioner near Sarita, Texas, as he was attempting to circumvent a border patrol checkpoint. PSR ¶ 4. Petitioner, who is a citizen and national of Mexico with no legal status in the United States, admitted that he had illegally entered the United States by crossing the Rio Grande River near Hidalgo, Texas, several days earlier. PSR ¶¶ 4-5. A records check revealed that petitioner had been convicted of aggravated burglary in Tennessee in 2002 and 2011 and previously had been deported from the United States to Mexico in 2007 and 2012. PSR ¶ 5.

a. Petitioner was charged in the Southern District of Texas with one count of being found unlawfully

present in the United States after having been deported following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). J.A. 12-13. He pleaded guilty without a plea agreement. J.A. 45-46.

The Probation Office prepared a PSR that calculated petitioner's base offense level as eight under Sentencing Guidelines § 2L1.2(a) (2012). PSR ¶ 13. The Probation Office recommended a 16-level increase in petitioner's offense level under Section 2L1.2(b)(1)(A)(ii) because petitioner previously had been deported after convictions for aggravated burglary, a felony crime of violence. PSR ¶ 14; see Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2012) (defining the term "crime of violence" to include "burglary of a dwelling"). With a three-level reduction in the offense level for acceptance of responsibility, the Probation Office calculated petitioner's total offense level as 21. PSR ¶¶ 19, 22.

The Probation Office determined that petitioner had 18 criminal history points, which placed him in criminal history category VI, the highest in the Guidelines. PSR ¶ 35. The PSR assessed four criminal history points for petitioner's two 2002 Tennessee aggravated burglary convictions, PSR ¶¶ 25-26; one criminal history point for a prior federal illegal-reentry conviction in 2007, PSR ¶ 27; and two additional points under Section 4A1.1(d) because, at the time of the instant offense, petitioner was still on parole for sentences imposed in 2011, PSR ¶ 34.

Those sentences had been imposed for a series of five aggravated burglaries that petitioner committed in May 2009 and May 2010 and for which he was sentenced to eight years of imprisonment on April 7, 2011. PSR ¶¶ 28-32. The Probation Office assessed a

total of 11 criminal history points for the five sentences. It assessed three points under Section 4A1.1(a) for each of three burglaries that petitioner committed on separate occasions and for which he was arrested on three different dates. PSR ¶¶ 28, 29, 32. It then added two more points for the remaining burglaries under Section 4A1.1(e), a provision that applies to "each prior sentence resulting from a conviction of a crime of violence that" does not otherwise receive any points under the Guidelines "because such sentence was counted as a single sentence." Sentencing Guidelines § 4A1.1(e); see PSR ¶¶ 30-31.

A total offense level of 21 and a criminal history category of VI resulted in an advisory Sentencing Guidelines range of 77 to 96 months of imprisonment. PSR ¶ 74. The Probation Office also noted that petitioner was subject to a statutory maximum term of 20 years of imprisonment under 8 U.S.C. 1326(a) and (b). PSR ¶ 73.

b. In November 2012, the PSR was disclosed to the parties. J.A. 3. The parties had 14 days from receipt of the PSR to file any written objections. See Fed. R. Crim. P. 32(f)(1). On December 7, 2012, the government filed a notice that it had no objections to the PSR. J.A. 14. On December 19, 2012, petitioner filed a written notice raising a single objection—*viz.*, that the Probation Office had erred in assessing a 16-level enhancement based on petitioner's prior aggravated burglary convictions, because none of those convictions qualified as a crime of violence under the relevant Sentencing Guidelines definition. J.A. 16. Petitioner did not object to the PSR's calculation of his criminal history score. *Ibid.*

On December 20, 2012, the Probation Office filed an addendum recommending that petitioner's objection to the 16-level crime-of-violence enhancement be overruled. Add. to PSR 1A-2A. It also submitted a sealed recommendation, disclosed to the parties and the district court, that petitioner be sentenced to "77 months [of] incarceration, the low-end of the applicable custody guideline range." Sealed Sent. Recommendation 1. The recommendation described petitioner's prior convictions, explained that petitioner "ha[d] been in continued contact with law enforcement authorities for the past 11 years," and stated that "prior sanctions ha[d] failed to deter him from continued criminal conduct." *Ibid.* The Probation Office concluded that "a sentence of 77 months [of] incarceration would best meet the sentencing objectives outlined in 18 U.S.C. § 3553(a)," *ibid.*, and recommended that the court pair that sentence with a three-year term of supervised release, which would "allow the [c]ourt to maintain a degree of leverage should [petitioner] return to the United States illegally." *Id.* at 2.

2. On January 14, 2013, the parties convened for the sentencing hearing. J.A. 19. Petitioner's counsel told the district court that he was "not satisfied with what" he had done to develop petitioner's objection to the 16-level enhancement and requested a 30-day continuance "to be[] able to present something to the [c]ourt." J.A. 20. The court granted the request. J.A. 22.

On March 14, 2013, after an additional continuance at petitioner's request, J.A. 5, the sentencing hearing resumed. J.A. 24. Petitioner's counsel presented argument on his objection to the 16-level enhancement, explaining that, although the "initial" ground

for objecting had been "cure[d]" by language in the charging documents that the government submitted to establish the convictions, the convictions did not qualify as crimes of violence on another ground. J.A. 26. After considering circuit precedent addressing the newly raised ground, the district court overruled the objection, concluded that petitioner's conviction qualified as a crime of violence, and adopted the PSR's calculation of an advisory range of 77 to 96 months. J.A. 26-30, 33.

The district court then sought the parties' positions on the appropriate sentence. The government urged the court to impose "a high end sentence of 96 months" in order "to protect the public from" petitioner, emphasizing that petitioner's multiple burglary convictions had involved "breaking into people's homes," including while armed. J.A. 30-31. Petitioner responded, through counsel, that he had not used violence during the burglaries and that he had committed those crimes to support his drug habit. J.A. 31-32. Petitioner's counsel stated that the 77-month term recommended by the Probation Office was "a severe sentence" that could be paired with a supervised-release term and asked that the court impose that sentence. J.A. 32. Petitioner then addressed the court, attributing his prior convictions to his drug addiction and asserting that he would no longer return to the United States. J.A. 32-33. The court sentenced petitioner to 77 months of imprisonment, to be followed by three years of supervised release. J.A. 33.

3. On appeal, petitioner's court-appointed appellate counsel filed a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), seeking to withdraw be-

cause "the appeal presents no legally nonfrivolous questions with regard to [petitioner's] sentence." Pet. C.A. *Anders* Br. ii. The brief stated, among other things, that "[t]he PSR correctly calculated [petitioner's] criminal history score" and reviewed those calculations in detail. *Id.* at 12-14.

Petitioner filed a pro se response asserting that the district court had erred in calculating his criminal history score because "there was no intervening arrest between" any of the five burglary offenses for which he was sentenced in April 2011. Pet. C.A. *Anders* Resp. Br. 6. As a result, petitioner suggested, at least one of his convictions had been improperly assessed three points under Sentencing Guidelines § 4A1.1(a), rather than one point under Section 4A1.1(e). Pet. C.A. *Anders* Resp. Br. 6.

On January 14, 2014, the court of appeals issued a single-judge order denying counsel's motion to withdraw because "it is not clear whether the probation officer correctly assessed a total of 11 criminal history points for [petitioner's burglary] sentences." 1/14/2014 Order 2. The court ordered counsel to file either "a supplemental *Anders* brief or a brief on the merits addressing whether the criminal history category was accurately calculated." *Ibid.*

Counsel filed a merits brief arguing that the district court had plainly erred in calculating petitioner's criminal history. Pet. C.A. Br. 12-16. The brief pointed to a provision in the Guidelines instructing courts that, when computing a defendant's criminal history category, sentences "imposed on the same day" are not counted separately, unless "the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the

first offense prior to committing the second offense)." Sentencing Guidelines § 4A1.2(a)(2). Pet. C.A. Br. 12-14. Petitioner asserted that, absent the misapplication of that provision, he would have had a criminal history category of V rather than VI and an advisory Guidelines range of 70 to 87 months, instead of 77 to 96 months. *Id.* at 16. Petitioner argued that there was a reasonable probability that he would have received a lower sentence if the district court had applied the correct advisory Guidelines range, because the court had sentenced him at the low end of the incorrect range "despite the government's strongly worded plea for the maximum Guidelines prison sentence of 96 months." *Id.* at 17-18 (emphasis omitted).

In response, the government conceded that the district court had erred in calculating petitioner's criminal history category and that the error was plain. Gov't C.A. Br. 13-14. The government pointed out, however, that the correct Guidelines range overlapped substantially with the incorrect range, the district court imposed a sentence within the overlap, and the court had expressed no intention to impose the low end of any Guidelines range. *Id.* at 19. The government thus argued that petitioner had not shown the requisite reasonable probability of a lower sentence and that the court should not exercise its discretion to correct the error because the Guidelines themselves contemplate an upward departure when Section 4A1.2's single-sentence rule causes the advisory range to understate the seriousness (or frequency) of a defendant's criminal history. *Id.* at 19-21 (citing Sentencing Guidelines § 4A1.2, comment. (n.3)).

4. The court of appeals affirmed. J.A. 45-49. The court first held that, because petitioner did not raise

an objection to the criminal history calculation before the district court, his claim was reviewable only for plain error under Federal Rule of Criminal Procedure 52(b). J.A. 46. The court concluded that the district court had made "a plain or obvious error" in calculating petitioner's criminal history when it assessed 11 criminal history points for the five Tennessee aggravated burglary convictions for which petitioner was sentenced in April 2011. J.A. 46-47. The court explained that, under Section 4A1.2(a)(2) of the Guidelines, prior sentences are counted as a single sentence if they were imposed on the same day, unless the offenses were separated by an intervening arrest. J.A. 46. Because no arrest intervened between any of the five burglaries, the court concluded that petitioner should have received only five points for the five burglaries, resulting in a total of 12 criminal history points, a criminal history category of V, and an advisory Guidelines range of 70 to 87 months. J.A. 46-47.

The court of appeals concluded, however, that petitioner had not established that the error affected his substantial rights. Initially, the court rejected petitioner's contention that any error in calculating the Guidelines range "should be considered presumptively prejudicial." J.A. 47 n.1. It then held that he had not shown "a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence." J.A. 47 (quoting *United States* v. *Garcia-Carrillo*, 749 F.3d 376, 379 (5th Cir.), cert. denied, 135 S. Ct. 676 (2014)).

The court of appeals observed that petitioner's sentence of 77 months of imprisonment was at the bottom of the advisory Guidelines range that the district court had applied and in the middle of the correct Guide-

lines range. J.A. 47-48. Because petitioner's sentence fell within both Guidelines ranges, the court explained that petitioner was obligated "to point to 'additional evidence' in the record, other than the difference in ranges, to show an effect on his substantial rights." J.A. 48 (quoting *United States* v. *Pratt*, 728 F.3d 463, 482 (5th Cir. 2013), cert. denied, 134 S. Ct. 1328 (2014)). The court explained that petitioner could not make that showing based on "[t]he mere fact that" he had been sentenced at the low end of the incorrect range. J.A. 48-49. Nor, the court concluded, did "the parties' anchoring of their sentencing arguments in the Guidelines [or] the district court's refusal to grant the government's request for a high-end sentence" establish a reasonable probability of a lower sentence. J.A. 49.

SUMMARY OF ARGUMENT

On plain-error review under Federal Rule of Criminal Procedure 52(b), a party complaining of an error in the calculation of the advisory Guidelines range is not entitled to a presumption that the error affected substantial rights. Rather, the party must make the usual case-specific showing that the forfeited error had a reasonable probability of affecting the outcome.

A. As a general rule, a party who has forfeited a claim of error must carry the burden of showing that the error affected substantial rights by affecting the outcome of the proceeding. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The Court has held defendants to that burden for all errors that are capable of being assessed for harmlessness when the claim is preserved and the government must show that the error did *not* affect substantial rights under Federal Rule of Criminal Procedure 52(a).

Misapplications of the Sentencing Guidelines are such errors. Those errors were reviewed for harmlessness when the Guidelines were mandatory. *Williams* v. *United States*, 503 U.S. 193, 203 (1992). And even misapplications of the advisory Guidelines carrying constitutional implications can be harmless. *Peugh* v. *United States*, 133 S. Ct. 2072, 2088 n.8 (2013). A rebuttable presumption of prejudice that would favor a defendant who forfeited a claim of error would unsettle the established case-specific framework of Rule 52 by shifting the burden of persuasion back to the government despite the defendant's forfeiture—thereby erasing the main relevant difference between Rules 52(a) and 52(b). Although *Olano* reserved whether such a presumption could ever be employed, its analysis of the text of Rule 52 suggests that creation of a presumption (outside of cases where constitutional holdings recognize one) is not an appropriate implementation of the rule.

B. Assuming that such a non-constitutional presumption could be created, petitioner's arguments for a presumption of prejudice for Guidelines calculation errors lack merit. The proposed presumption is contrary to the general principle that appellate courts reviewing a closed record for harmlessness should do so based on the specific circumstances, without employing legal presumptions that normally would be used to aid the presentation of proof at trial. See *Shinseki* v. *Sanders*, 556 U.S. 396, 407 (2009) (citing *Kotteakos* v. *United States*, 328 U.S. 750, 760 (1946)). And an across-the-board presumption for all Guidelines errors would be unfounded as a practical matter. No one doubts that the Guidelines play a central role in structuring federal sentencing and that, "in gen-

eral, this system will steer courts to more within-Guidelines sentences." *Peugh*, 133 S. Ct. at 2084. But not all Guidelines errors are likely to have the same prejudicial effect, and a categorical rule would thus be empirically inaccurate. Reviewing courts are also fully capable of discerning prejudice in individual cases based on the nature and magnitude of the error at issue, and in light of other record information routinely developed in federal sentencing proceedings. Furthermore, preserving the rule that a party must show that a clear Guidelines error likely affected the outcome preserves the proper incentive of parties to make timely objections and focus their full attention on the matter when it is before the district court. A presumption of prejudice would erode that incentive. Accordingly, the Court should adhere to the normal rule calling for "case-specific application of judgment" by an appellate court, "based upon examination of the record." *Sanders*, 556 U.S. at 407.

C. Alternatively, petitioner contends that he is entitled to relief even absent a presumption of prejudice. That argument is not fairly encompassed by the question presented and would not necessarily resolve the case in his favor, because petitioner has not demonstrated that letting stand a sentence that is still within the Guidelines—and that would reflect the bottom of the range under an available criminal-history departure—would undermine the fairness or integrity of the proceedings. In any event, without the benefit of a presumption, petitioner cannot establish that the Guidelines error affected his substantial rights. Given that the Guidelines error changes the scoring but not the fact of his criminal history and that his sentence still falls within the correct range, it is not reasonably

probable that correction of the error would result in a lower sentence.

ARGUMENT

AN ERROR IN CALCULATING THE ADVISORY SENTENCING GUIDELINES RANGE SHOULD NOT BE PRESUMED TO AFFECT SUBSTANTIAL RIGHTS ON PLAIN-ERROR REVIEW

If a defendant in a criminal case forfeits a claim of error by failing to object at the time the error occurs, he may obtain relief on appeal only by satisfying the rigorous requirements of the plain-error standard set forth in Federal Rule of Criminal Procedure 52(b). That standard requires, among other things, that the error have "affect[ed] substantial rights." Fed. R. Crim. P. 52(b). In *United States* v. *Olano*, 507 U.S. 725 (1993), the Court held that a defendant seeking to satisfy that requirement "[n]ormally * * * must make a specific showing of prejudice," that is, a showing that the error "affected the outcome of the district court proceedings." *Id.* at 734-735. Although the Court mentioned the possibility that some errors could "be presumed prejudicial" under Rule 52(b), *id.* at 735, it declined to presume that the error in *Olano* was prejudicial and has not recognized any error as triggering a presumption of prejudice in the almost 25 years since.

Petitioner contends (Br. 21-53), however, that *Olano* and other decisions of this Court authorize courts of appeals to identify categories of errors as presumptively prejudicial and that a misapplication of the advisory Sentencing Guidelines falls within that category. This Court should reject those contentions. Errors in applying the Sentencing Guidelines have long been subject to harmless-error analysis when

timely raised, and they should be subject to Rule 52(b)'s usual case-specific prejudice analysis when forfeited.

A. To Obtain Relief Under Rule 52(b) For A Forfeited Claim Of Guidelines Error, A Defendant Must Show A Reasonable Probability That He Would Have Received A Lower Sentence

1. The Court's plain-error precedents have required a case-specific showing of prejudice for all non-structural errors

a. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Rule 52(b)—the plain-error rule—"tempers the blow of a rigid application of the contemporaneous-objection requirement," *United States* v. *Young*, 470 U.S. 1, 15 (1985), by "provid[ing] a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court," *Olano*, 507 U.S. at 731. The rule thus strikes a "careful balanc[e]" between "our need to encourage all trial participants to seek a fair and accurate trial the first time around [and] our insistence that obvious injustice be promptly redressed." *United States* v. *Frady*, 456 U.S. 152, 163 (1982).

Rule 52(b) protects important values. It "serves to induce the timely raising of claims and objections, which gives the district court"—the court that "is ordinarily in the best position to determine the rele-

vant facts and adjudicate the dispute"—"the opportunity to consider and resolve" the objections. *Puckett* v. *United States*, 556 U.S. 129, 134 (2009); see *United States* v. *Vonn*, 535 U.S. 55, 73 (2002) ("[T]he value of finality requires defense counsel to be on his toes, not just the judge."); *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977) (contemporaneous-objection rule "encourages the result that [trial] proceedings be as free of error as possible"). It "reduce[s] wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82 (2004). And it diminishes opportunities for gamesmanship. See *Puckett*, 556 U.S. at 134; *Vonn*, 535 U.S. at 73; *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *Wainwright*, 433 U.S. at 89.

To achieve these objectives, Rule 52(b) imposes three "limitation[s] on appellate authority" to grant relief based on forfeited claims. *Olano*, 507 U.S. at 732. The rule states that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). In *Olano*, this Court held that, "before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (brackets in original) (quoting *Olano*, 507 U.S. at 732). An appellant meets the first two of these prongs by showing an error that is clear at the time of the appeal, *Henderson* v. *United States*, 133 S. Ct. 1121, 1124-1125 (2013), and satisfies the third prong by showing a reasonable probability that, absent the error, the result of the proceeding would have been different.

See *Dominguez Benitez*, 542 U.S. at 81-82 (adopting the same standard for plain-error cases as for other "cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief" (citation omitted)). The reviewing court assesses the reasonable probability based on "the entire record." *Vonn*, 535 U.S. at 59, 68.

When all three of those requirements are satisfied, "the court of appeals has authority to order correction, but [it] is not required to do so." *Olano*, 507 U.S. at 735. Instead, a reviewing court "may * * * exercise its discretion to notice a forfeited error" only if a fourth condition is satisfied: "the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (brackets in original; citation omitted). This criterion "is meant to be applied on a case-specific and fact-intensive basis" that eschews "*per se*" rules. *Puckett*, 556 U.S. at 142 (citation omitted).

The Court has emphasized that "[m]eeting all four prongs" of the plain-error test "is difficult, 'as it should be.'" *Puckett*, 556 U.S. at 135 (quoting *Dominguez Benitez*, 542 U.S. at 83 n.9). And the Court "ha[s] repeatedly cautioned that '[a]ny unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice" and that "the creation of an unjustified exception to the Rule would be '[e]ven less appropriate.'" *Id.* at 135-136 (second and third brackets in original) (quoting *Young*, 470 U.S. at 15, and *Johnson*, 520 U.S. at 466).

b. The question presented here concerns the third of Rule 52(b)'s limitations—the requirement that an error "affect[] substantial rights."

i. In *Olano*, *supra*, the Court observed that Rule 52(b) uses "the same language" as the neighboring harmless-error provision applicable "[w]hen the defendant has made a timely objection to an error." 507 U.S. at 734. The Court explained that, when "Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record * * * to determine whether the error was prejudicial," which "in most cases" means that the error "must have affected the outcome of the district court proceedings." *Ibid.* "Rule 52(b)," the Court continued, "normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.* The Court explained that "[t]his burden shifting [wa]s dictated by a subtle but important difference in language" between Rule 52's two parts, with the harmless-error provision precluding relief "only if the error 'does *not* affect substantial rights'" and the plain-error rule "authori[zing] no remedy unless the error *does* 'affec[t] substantial rights.'" *Id.* at 734-735 (fourth set of brackets in original; citation omitted).

In describing the analysis applicable "in most cases," the Court in *Olano* stated that it "need not decide whether the phrase 'affect[s] substantial rights' is always synonymous with 'prejudicial.'" 507 U.S. at 735.[1] The Court thus reserved the question of whether "[t]here may be a special category of forfeited er-

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[1] The Court in *Olano* quoted the word "affecting" from the version of Rule 52(b) then in effect. The current version of the rule uses the word "affects," but that change was "intended to be stylistic only." Pet. Br. 19 n.7 (quoting Fed. R. Crim. P. 52 advisory committee's note (2002) (Amendment)).

rors that can be corrected regardless of their effect on the outcome." *Ibid.* As petitioner observes (Br. 21), the Court has since suggested that this "special category" refers to the errors termed "structural" under the Court's precedents—that is, the small set of "errors that affect the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error." *United States* v. *Marcus*, 560 U.S. 258, 263 (2010) (brackets, citations, and internal quotation marks omitted); see *Puckett*, 556 U.S. at 140-141; *Johnson*, 520 U.S. at 468-469. "Errors of this kind include denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt." *United States* v. *Davila*, 133 S. Ct. 2139, 2149 (2013).

The Court in *Olano* concluded, however, that the error at issue in that case—the presence of alternate jurors during jury deliberations, in violation of Federal Rule of Criminal Procedure 24(c)—was not the kind of error that might "affec[t] substantial rights independent of prejudice." 507 U.S. at 737. The Court explained that it "generally ha[d] analyzed outside intrusions upon the jury for prejudicial impact" and that "reversal would be pointless" if the intrusion had resulted in "no harm." *Id.* at 738 (citation omitted).

The Court also declined to address whether there exists a class of "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735; see also *id.* at 739 (citing the jury-intrusion decisions in *Patton* v. *Yount*, 467 U.S. 1025 (1984) (potentially prejudicial pretrial publicity), and *Turner* v. *Louisiana*, 379 U.S. 466 (1965) (association of sequestered jurors with

deputy sheriffs who were witnesses at trial)). Instead, the Court concluded that the alternate-juror error did not warrant a presumption of prejudice even if one were possible. *Olano*, 507 U.S. at 740-741. The Court explained that, "[i]n theory," the presence of alternate jurors during jury deliberations might prejudice a defendant in two different ways: "because the alternates actually participated in the deliberations" or "because the alternates' presence exerted a 'chilling' effect on the regular jurors." *Id.* at 739. After finding no actual prejudice, the Court held that the court of appeals had incorrectly concluded that the Rule 24(c) violation was "inherently prejudicial." *Id.* at 740 (citation omitted). In so doing, the Court noted that the alternate jurors are assumed to have followed the district court's instruction that they not participate in the deliberations, *ibid.*, and it rejected the suggestion that "the mere presence of alternate jurors entailed a sufficient risk of 'chill' to justify a presumption of prejudice on that score." *Id.* at 741.

ii. Since *Olano*, the Court has not exempted any forfeited errors from the general rule that a defendant make a specific showing of prejudice to establish an effect on his substantial rights. The Court has instead required that particularized showing for a variety of "nonstructural error[s]," *Dominguez Benitez*, 542 U.S. at 82: violations of the Federal Rule of Criminal Procedure "meant to ensure that a guilty plea is knowing and voluntary," *Vonn*, 535 U.S. at 58; see *Dominguez Benitez*, 542 U.S. at 83; the government's breach of a plea agreement at sentencing, *Puckett*, 556 U.S. at 140-142; and jury-instruction errors in capital cases, *Jones* v. *United States*, 527 U.S. 373, 394-395 (1999), and where the error was claimed to be of con-

stitutional dimension, *Marcus*, 560 U.S. at 263-265 (error that could have caused jury to convict based on conduct not yet made criminal at the time). See also *Davila*, 133 S. Ct. at 2147-2150 (rejecting per se reversal for violating the prohibition on judicial participation in plea discussions in Fed. R. Crim. P. 11). And while the Court has continued to reserve the question whether "structural errors might affect substantial rights regardless of their actual impact on an appellant's trial," *Marcus*, 560 U.S. at 263 (brackets and internal quotation marks omitted); see *Puckett*, 556 U.S. at 140-141; *United States* v. *Cotton*, 535 U.S. 625, 632 (2002); *Johnson*, 520 U.S. at 468-469, it has never again suggested that some category of errors might be presumptively prejudicial under Rule 52(b).[2] Indeed, the most logical interpretation of *Olano* is that only those errors that might, in constitutional analysis, warrant a presumption of prejudice could be so treated under Rule 52(b). See 507 U.S. at 739 (citing *Yount*, *supra*, and *Turner*, *supra*). The possibility that courts could create such burden-shifting presumptions under Rule 52 itself would contradict *Olano*'s emphasis on the "important difference" between the two subparts of Rule 52, under which the burden is "shift[ed]" to the defendant under Rule 52(b) to show that a forfeited error affected his substantial rights. *Id.* at 734-735; see pp. 27-28, *infra*.[3]

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[2] The proper treatment of structural errors is not implicated here, because petitioner disclaims (Br. 21-22) any suggestion that a misapplication of the Sentencing Guidelines is a structural error.

[3] *Olano* itself did not have to resolve that question because the Court concluded that the error at issue there would not warrant a presumption of prejudice, assuming one could be recognized. 507 U.S. at 740-741; see pp. 19-20, *supra*.

The Court's subsequent decisions are consistent with that analysis. For example, in *Dominguez Benitez*, the Court reaffirmed that, outside of "certain structural errors" that "require[] reversal without regard to the mistake's effect on the proceeding," a party is entitled to "relief for error" under Rule 52 only if the error had "a prejudicial effect on the outcome of a judicial proceeding." 542 U.S. at 81. The Court stressed that "the burden of establishing entitlement to relief for plain error is on the defendant claiming it" and "should not be too easy" for defendants such as the respondent in that case, who sought to withdraw his guilty plea based on an unpreserved claim that the district court failed to give a warning required by Rule 11. *Id.* at 82. The Court therefore held that such a defendant "must show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83.

In *Puckett*, the Court held that a case-specific showing of prejudice is required for a forfeited claim that the government breached a plea agreement at sentencing, even though that error would have triggered automatic reversal on appeal had it been timely raised. 556 U.S. at 139-143. The Court explained that "breach of a plea deal is not a 'structural' error"—*i.e.*, an error that "affect[s] 'the framework within which the trial proceeds,'" *id.* at 140 (citation omitted)—and that it is no more difficult to assess the effect of "plea breaches at sentencing than" to assess the effect of "other procedural errors at sentencing, which are routinely subject to harmlessness review." *Id.* at 140-141 (citing *United States* v. *Teague*, 469 F.3d 205, 209-210 (1st Cir. 2006), which had held a misapplication of the career-offender guideline to be harmless error).

Because the error in *Puckett* was "*susceptible*, or * * * *amenable*, to review for harmlessness," the Court saw "no need to relieve the defendant of his usual burden of showing prejudice." *Id.* at 141.

In *Marcus*, the Court rejected a court of appeals rule under which defendants were entitled to relief on plain-error review if "any possibility" existed that they had been convicted based on conduct that had not yet been made criminal at the time of their actions. 560 U.S. at 263-266 (quoting and reversing *United States* v. *Marcus*, 538 F.3d 97, 102 (2d Cir. 2008)). In defending that rule, the defendant argued that the error was structural and that, in any event, it "should be presumed to be prejudicial especially because of the difficulty encountered by a defendant in being able to show he has suffered harm." Resp. Br. at 27, *Marcus*, *supra*, No. 08-1341 (Jan. 19, 2010); see *id.* at 32-33 (arguing, based on lower-court decisions involving denial of a defendant's right to allocute at sentencing, that "prejudice should be presumed if there is '*any possibility*' of a different outcome").[4]

The Court in *Marcus* declined to presume that the error satisfied the third and fourth prongs of plain-error review. It again noted "the possibility" that "structural errors[] might affect substantial rights regardless of their actual impact on an appellant's

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[4] In *Puckett*, the petitioner had likewise suggested that "a plea agreement breach is within the category of errors 'that should be presumed prejudicial,'" Pet. Br. at 25-26, *Puckett*, *supra*, No. 07-9712 (Nov. 17, 2008), and a supporting amicus made a similar argument. See Nat'l Ass'n of Criminal Def. Lawyers Amicus Br. at 14, *Puckett*, *supra* ("[E]ither there should be a presumption of prejudice when a plea agreement has been breached, or a reviewing court should not inquire into prejudice at all.").

trial." 560 U.S. at 263. But, the Court concluded, the error in *Marcus* was "'non-structural,'" and an appellate court could assess the "risk" to the defendant's rights created by the instructions, as it could with other non-structural errors in instructions. *Id.* at 263-264. The Court further observed that errors similar to the one in *Marcus* "come in various shapes and sizes," which means that "[t]he kind and degree of harm that such errors create can consequently vary." *Id.* at 265. Accordingly, the Court saw "no reason why this kind of error would automatically 'affect substantial rights' without a showing of individual prejudice." *Id.* at 264-265 (brackets omitted).

Most recently, in *Davila*, the Court rejected a court of appeals rule requiring automatic vacatur of a guilty plea for violations of Federal Rule of Criminal Procedure 11(c)(1), which bars judicial participation in plea discussions. 133 S. Ct. at 2143. The Court explained "that particular facts and circumstances matter," even if some serious violations of the rule would likely be prejudicial. *Id.* at 2149. The Court thus held that, whether conducting harmless- or plain-error review, an appellate court must "engage in [a] full-record assessment" to determine prejudice, *id.* at 2150—that is, "the impact of the error on the defendant's decision to plead guilty," *id.* at 2148.

2. Misapplications of the Guidelines are non-structural errors subject to a case-specific prejudice showing both when preserved and when forfeited

This Court's decisions thus establish two principles that suffice to resolve this case. First, when a non-structural error "come[s] in various shapes and sizes" and creates varying "degree[s] of harm," Rule 52(b)

requires the party that forfeited the claim of error to make "a showing of individual prejudice." *Marcus*, 560 U.S. at 265; see *Davila*, 133 S. Ct. at 2149-2150. Second, when a "procedural error[] at sentencing" is "amenable" to review for harmlessness, Rule 52(b) holds the defendant to his "usual burden of showing prejudice." *Puckett*, 556 U.S. at 141 (emphasis omitted). Both of those principles apply to misapplications of the Sentencing Guidelines.

a. Errors in applying the Guidelines "come in various shapes and sizes" and create varying "kind[s] and degree[s] of harm." See *Marcus*, 560 U.S. at 265. For example, an error may be of such numerical impact that a sentence the judge declared to be within the Guidelines now lies well above the correct advisory range. Another error, by contrast, might be minor enough that the correct and incorrect ranges overlap—the class of cases in which the Sentencing Commission itself recognized that the calculation "will not necessarily make a difference in the sentence that the court imposes." Sentencing Guidelines Ch. 1, Pt. A, intro. comment. 1, § 4(h), at 11 (2012). The error may be of a type that a reviewing court believes less likely to have affected the sentence because, for example. the error does not suggest that the sentencing judge misunderstood the underlying facts of the offense or their significance under the sentencing factors in 18 U.S.C. 3553(a). See *United States* v. *Zabielski*, 711 F.3d 381, 387-388 (3d Cir. 2013) (so concluding as to a two-level threat-of-death enhancement in a bank-robbery case). And, regardless of its nature, an error may be harmless simply because the record makes clear that the court would have imposed the same

sentence despite a lower advisory range. See Pet. Br. 44-45 n.18 (citing examples).

This Court's decision in *Peugh* v. *United States*, 133 S. Ct. 2072 (2013), confirms that the same principles hold true when the misapplication of the Guidelines has constitutional implications. In holding that the Ex Post Facto Clause applies to retrospective increases in the now-advisory Guidelines, the Court in *Peugh* concluded that an increase in a defendant's Guidelines range creates a significant risk that he will receive a higher sentence. *Id.* at 2083. *Peugh* also recognized, however, that the risk may not materialize in every case.[5] The Court thus explained that a district court's erroneous application of "newer, more punitive" Guidelines may be found harmless when "the record makes clear that" the same sentence would have been imposed "under the older, more lenient Guidelines." *Id.* at 2088 n.8 (citing *Chapman* v. *California*, 386 U.S. 18 (1967)).

b. The Court's precedents make equally clear that non-constitutional Sentencing Guidelines errors are procedural errors amenable to appellate review for prejudicial effect. See *Puckett*, 556 U.S. at 141 (citing with approval a court of appeals decision holding a misapplication of the career-offender guideline to be harmless error). Even when the Guidelines were mandatory, preserved claims that a district court had misapplied the Guidelines were subject to review for

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[5] One case decided after *Peugh* serves as an example. After the court of appeals reversed on plain-error review following *Peugh*, *United States* v. *Williams*, 742 F.3d 304, 306-307 (7th Cir. 2014), the district court reimposed the same above-Guidelines sentence despite the lower range. 09-cr-90 Docket entry No. 77 (N.D. Ind. Aug. 25, 2014) (reimposing 56-month sentence on relevant counts).

harmlessness under Rule 52(a), and a reviewing court could affirm a sentence if it "conclude[d], on the record as a whole, * * * that the error did not affect the district court's selection of the sentence imposed." *Williams* v. *United States*, 503 U.S. 193, 203 (1992); see *Koon* v. *United States*, 518 U.S. 81, 113 (1996). Petitioner does not dispute that the same harmless-error rule applies to the now advisory Guidelines. See Pet. Br. 44 & n.18; see also *Puckett*, 556 U.S. at 141. As a result, his Guidelines-misapplication claim should be subject to the normal case-specific prejudice analysis under Rule 52, with the only difference being that petitioner, not the government, bears the burden of persuasion under Rule 52(b). *Olano*, 507 U.S. at 734; see *Vonn*, 535 U.S. at 62-63 (on plain-error review, "the tables are turned" and the defendant must show an effect on substantial rights).

Petitioner's proposed presumption of prejudice, however, would shift the burden right back to the government. See *Black's Law Dictionary* 1376 (10th ed. 2014) ("A presumption shifts the burden of production or persuasion to the opposing party."); 2 Kenneth S. Brown et al., *McCormick on Evidence* § 343, at 681 (7th ed. 2013) ("A presumption shifts the burden of producing evidence, and may assign the burden of persuasion as well."); cf. *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932) ("A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof."). The presumption would thus eliminate what the Court has described as the "main difference" between the substantial-rights analyses called for by Rules 52(a) and (b), *Dominguez Benitez*, 542 U.S. at 82 n.8, and with it, a principal incentive for defendants to lodge contemporaneous objections to

the district court's Guidelines calculations. See *Vonn*, 535 U.S. at 63 (explaining that, if a defendant has "a right to subject the [g]overnment to the burden of demonstrating harmlessness," then he "loses nothing by failing to object to obvious * * * error when it occurs").

c. As the Court's decision in *Puckett* illustrates, the proposed presumption would also lead to an unjustified distinction in plain-error analysis depending on the reason that a defendant is subject to an erroneously high Guidelines range. The defendant in *Puckett* argued that the government had breached the plea agreement by failing to recommend a three-level reduction in the Guidelines offense level, including a one-level reduction that the sentencing judge cannot grant absent a government motion. 556 U.S. at 131-133; see Sentencing Guidelines § 3E1.1(b). This Court held that the defendant had to carry his "usual burden" of making a case-specific showing of prejudice, 556 U.S. at 141, and that "the 'outcome' he must show to have been affected is his sentence." *Id.* at 142 n.4. If petitioner's position were adopted, however, a defendant subject to a higher advisory range because the judge erred in construing the Guidelines would be entitled to a presumption of prejudice, whereas a defendant subject to a higher range because the government breached a Guidelines-related promise in a plea agreement—for example, to move for an offense-level reduction under Section 3E1.1(b) or for a substantial-assistance departure under Section 5K1.1—would be held to "his usual burden of showing prejudice." *Id.* at 141. Nothing in logic or this Court's precedents supports that disparate treatment.

B. Petitioner's Arguments For A Presumption of Prejudice Lack Merit

Although acknowledging that the Court has never found an error to be presumptively prejudicial for purposes of Rule 52(b), petitioner contends that a "rebuttable presumption of harm" is appropriate for errors in applying the Sentencing Guidelines because, he claims, "the 'natural effect'" of such errors is to have a likely effect on the outcome and, given the nature of the error, defendants will find it difficult to establish case-specific prejudice. Pet. Br. 26-43 (capitalization altered). Those contentions lack merit.

1. This Court's precedents do not support a category-wide presumption of prejudice based on an error's natural effect

a. As petitioner appears to recognize (Br. 26-27), adopting presumptions about the prejudicial effect of "particular class[es] of error[s]" runs contrary to general principles of harmless-error review. This Court has "previously warned against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record." *Shinseki* v. *Sanders*, 556 U.S. 396, 407 (2009) (citing *Kotteakos* v. *United States*, 328 U.S. 750, 760 (1946)). The Court has instead construed the general federal harmless-error statute applicable to civil and criminal cases—which speaks of an error's effect on "substantial rights," 28 U.S.C. 2111—"as expressing a congressional preference for determining 'harmless error' without the use of presumptions." *Sanders*, 556 U.S. at 407-408. That preference, the Court has noted, aligns with Chief Justice Roger Traynor's admonition that appellate courts

reviewing a closed record for an error's effect upon the judgment "must do so without benefit of such aids as presumptions * * * that expedite fact-finding at the trial." Roger Traynor, *The Riddle of Harmless Error* 26 (1970) (*Traynor*); see *O'Neal* v. *McAninch*, 513 U.S. 432, 437 (1995). Chief Justice Traynor explained that those aids are "unsuited" to appellate review for harmlessness, *Traynor* 26, because at that stage the parties are not producing new evidence, but are "marshaling [existing] facts and evidence" to explain "why the erroneous ruling caused" (or did not cause) "harm." *Sanders*, 556 U.S. at 410; cf. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 359 n.45 (1977) (explaining that, at the trial stage, "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof").

b. Petitioner nevertheless contends (Br. 27) that the Court's decision in *Kotteakos*, *supra*, when "viewed through the prism of" a "qualification[]" in *Sanders*, 556 U.S. at 411, authorizes courts of appeals conducting plain-error review to adopt a "presumption of harm * * * based upon empirical evidence and experience that the 'natural effect' of a particular type of error is to affect substantial rights." Pet. Br. 27. Both of those decisions, however, weigh strongly against appellate court authority to adopt category-wide presumptions of prejudice under Rule 52(b).

i. The question in *Kotteakos* was whether a variance between the indictment and the evidence at the defendants' trial on a conspiracy charge had caused them "substantial prejudice." 328 U.S. at 752. In answering that question, the Court explained that it

had held that the same type of error in an earlier conspiracy case did not "'affect the substantial rights' of the accused," as required to reverse a conviction under the then-governing harmless-error statute, 28 U.S.C. 391. *Kotteakos*, 328 U.S. at 757 (quoting *Berger* v. *United States*, 295 U.S. 78, 82 (1935)). But the Court concluded that the distinct factual circumstances in *Kotteakos*—including the number of conspiracies proved and defendants involved, *id.* at 766, 772—made it "highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 776.

In describing its approach, the Court noted that the legislative history of the harmless-error statute stated that the burden of establishing (or disproving) an effect on substantial rights would vary depending on whether the error was "technical" or whether "its natural effect [wa]s to prejudice a litigant's substantial rights." *Kotteakos*, 328 U.S. at 760 (quoting H.R. Rep. No. 913, 65th Cong., 3d Sess. 1 (1919)). The Court did not, however, construe that language as licensing courts to adopt "presumptions" based on the type of legal error at issue. *Id.* at 765. To the contrary, the Court explained that the distinction intended by that language was "an injunction against attempting to generalize broadly, by presumption or otherwise," and that "[t]he only permissible presumption would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice *in the particular setting*." *Id.* at 765-766 (emphasis added). The case-specific nature of the inquiry was what permitted the Court to conclude that the same type of error deemed harmless in *Berger* was prejudicial in the case before it. *Id.* at 766. And it is

why the Court has since understood *Kotteakos* to have "flatly rejected *per se* rules regarding particular errors." *United States* v. *Lane*, 474 U.S. 438, 448 (1986); see *id.* at 463 & n.6 (Brennan, J., concurring in part and dissenting in part).[6]

ii. The Court's decision in *Sanders*, *supra*, similarly provides no support for the creation of presumptions of harmfulness. In that case, the Court rejected a Federal Circuit rule requiring the Court of Appeals for Veterans Claims (Veterans Court) to presume that the denial of required notice to disability claimants was "prejudicial" and mandated reversal unless the United States Department of Veterans Affairs (VA) could "show that the error did not affect the essential fairness of the adjudication." 556 U.S. at 404 (quoting and reversing *Sanders* v. *Nicholson*, 487 F.3d 881, 889 (2007)). The Court faulted the Federal Circuit's framework for being "complex, rigid, and mandatory," *id.* at 407, and explained that it both "impose[d] an unreasonable evidentiary burden upon the VA" and shifted to the VA "the burden of showing that an er-

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[6] *Kotteakos* is also a particularly weak basis for establishing a presumption in a plain-error case, because the Court there applied a harmless-error statute that, unlike the later-enacted Rule 52(a), did not have a plain-error counterpart. Cf. *Kotteakos*, 328 U.S. at 757 n.9 (noting that Rule 52 had taken effect after the trial in that case). The Court therefore did not consider a provision that distinguished between preserved and forfeited error precisely by shifting the burden of persuasion to the party who forfeited the error below. Nor did it address how forfeiture of a claim of error affected the "substantial rights" analysis. Accordingly, the references in *Kotteakos* to the parties' burdens under the former harmless-error statute should have no implications for a plain-error case under Rule 52(b).

ror" was harmless—an inversion of the "ordinary" burdens in a civil case. *Id.* at 408-409.

Petitioner's proposed presumption suffers from some of the same flaws. As explained above, pp. 27-28, *supra*, the presumption would invert the allocation of the burden of persuasion "dictated by" the text of Rule 52. *Olano*, 507 U.S. at 734. It would thus require the government not simply to identify "parts of the record to counter any ostensible showing of prejudice the defendant may make," *Vonn*, 535 U.S. at 68, but to show "with assurance that the use of an erroneous Guideline range had *no effect* on the district court's decision." Pet. Br. 47 (emphasis added). Moreover, the presumption would be "mandatory," *Sanders*, 556 U.S. at 407, in that it would apply whatever the nature or magnitude of the Guidelines error and without regard to whether the district court ultimately imposed a within-Guidelines sentence. See Pet. Cert. Reply Br. 5 ("[P]etitioner is arguing for such a presumption *whenever* a defendant is sentenced under the incorrect Guideline range."). And, while petitioner emphasizes (Br. 26, 43) that his presumption would be "rebuttable," so too was the presumption rejected in *Sanders*.[7] See 556 U.S. at 407 (explaining that the rule required reversal "unless the VA" made one of two showings); see also *Nicholson*, 487 F.3d at 891 (holding that notice errors "should be presumed prejudicial" and that "[t]he VA has the burden of rebutting this presumption"). That pre-

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[7] The Court's statement in *Sanders* that the presumption there was "mandatory," 556 U.S. at 407, did not mean, as petitioner appears to suggest (Br. 27, 43), that it was "conclusive" or "irrebutable." A presumption can be both "mandatory" and "rebuttable." Cf. *Francis* v. *Franklin*, 471 U.S. 307, 314 n.2 (1985).

sumption, the Court concluded, contributed to a framework that "increase[d] the likelihood of reversal in cases where, in fact, the error is harmless," and thus "diminishe[d] the public's confidence in the fair and effective operation of the judicial system." *Sanders*, 556 U.S. at 409.

Petitioner relies on the statement in *Sanders* "that courts may sometimes make empirically based generalizations about what kinds of errors are likely, as a factual matter, to prove harmful," and "might properly influence * * * future determinations" "by drawing upon 'experience' that reveals" the "natural effect" of such errors. Pet. Br. 27 (quoting 556 U.S. at 411, and citing *Kotteakos*, 328 U.S. at 760-761). The Court made that statement, however, in reserving the question of whether the Veterans Court—the specialized Article I court with "exclusive jurisdiction" over the class of disability claims, *Sanders*, 556 U.S. at 412—could itself adopt a presumption that shifted to the VA the burden of disproving prejudice for a single class of "notice errors." *Id.* at 411. That discussion does not suggest that federal courts of appeals reviewing criminal convictions may adopt presumptions that principally serve to relieve defendants of a burden "dictated by" the text of Rule 52. See *Olano*, 507 U.S. at 734.[8]

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[8] The presumption's incompatibility with the text of Rule 52 distinguishes this case from *Rita* v. *United States*, 551 U.S. 338 (2007), which held that courts of appeals may presume that a sentence within a properly calculated Guidelines range is reasonable. The Court in *Rita* interpreted not a statute or rule, but the standard of review that the Court itself had announced in *United States* v. *Booker*, 543 U.S. 220, 261-263 (2005). See 551 U.S. at 341. And the Court emphasized that the presumption at issue did not "hav[e] independent legal effect," *id.* at 350, because it did not

c. Petitioner proposes (Br. 27, 38) that courts of appeals determine the "natural effect" of a type of error based on "empirical evidence" and "experience." The courts of appeals to adopt a presumption of prejudice for Guidelines errors, however, have not done so based on those criteria. Rather, they have reasoned that every Guidelines misapplication risks affecting the sentence imposed because the "very *raison d'être*" of the Guidelines is to "affect sentencing." *Id.* at 37 (quoting *United States* v. *Knight*, 266 F.3d 203, 207 (3d Cir. 2001)); see *United States* v. *Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014). That rationale is flawed. As the Court explained in *Puckett*, 556 U.S. at 142, any error can be "recast[]" in that manner. Plea-colloquy errors can be recast as violations of a rule whose very purpose is "to ensure that a guilty plea is knowing and voluntary," *Vonn*, 535 U.S. at 58, and errors in retaining alternate jurors described as violations of a rule whose very purpose is "to protect the jury's deliberations from improper influence," *Olano*, 507 U.S. at 738. But this Court has required defendants who forfeited those claims of error to show case-specific prejudice, and it should do the same for Guidelines errors.

In any event, petitioner's natural-effects test is ill-suited for determining classes of errors that could conceivably be deemed presumptively prejudicial under Rule 52(b), as the class of sentencing errors at issue in this case demonstrates. In the wake of the Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), for example, a court of appeals assessing the "natural effect" of erroneously treating the Guide-

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"insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case," *id.* at 347.

lines as mandatory would have had no relevant data to consult because district courts had just begun sentencing under advisory Guidelines. And even now, with a body of judicial experience and data on advisory Guidelines sentencing, empirical evidence still provides an unreliable and shifting basis for crafting legal presumptions that may long outlive empirical generalizations thought true at the time.

Petitioner relies (Br. 34-35) on an updated set of the national sentencing statistics considered in *Peugh* and a chart summarizing the results of plain-error remands in cases involving overlapping ranges. The Sentencing Commission data indicate—and the government does not dispute—that the Guidelines continue to play a central role in federal sentencing, as they must in a system that treats them as the "starting point" in every sentencing. See *Peugh*, 133 S. Ct. at 2083; *id.* at 2084 (2011 version of that data indicated that the Guidelines were "hav[ing] the intended effect of influencing the sentences imposed by judges"). Petitioner's "anecdotal[]" evidence (Br. 35 n.14), however, adds little to that general proposition. The raw fact that a sentence changed under a different range does not indicate whether that change was attributable—in whole, in part, or not at all—to the new range. In several of petitioner's cases, for example, the defendant was originally sentenced under the mandatory Guidelines but resentenced after *Booker* had rendered the Guidelines advisory.[9] The defendant in at least one other case submitted on remand evidence of post-sentencing rehabilitation, as permitted under *Pepper*

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[9] *E.g.*, *United States* v. *Irvin*, 369 F.3d 284 (3d Cir. 2004); *United States* v. *Davis*, 397 F.3d 340 (6th Cir. 2005); *United States* v. *Oddo*, 133 Fed. Appx. 632 (11th Cir. 2005).

v. *United States*, 562 U.S. 476 (2011).[10] In still other cases, the change in the range was substantial enough that the court would have had to vary (or depart, for pre-*Booker* cases) above the Guidelines to impose the original sentence.[11] And, of course, petitioner's survey does not account for the cases in which appellate courts have concluded that a lower sentence was not reasonably likely under a lower range, *e.g.*, *United States* v. *Ault*, 598 F.3d 1039, 1042-1043 (8th Cir. 2010), or that a Guidelines error was harmless because it would *not* result in a different sentence, see Pet. Br. 44 n.18 (citing some such cases). The empirical evidence in this case thus sheds little reliable light on the "natural effect" of Guidelines errors as a category.

As a practical matter, then, much of the work in petitioner's test is performed by his second criterion: appellate courts' "experience" (Br. 27, 38) with different types of errors. But petitioner has not shown that this experiential factor can be applied in a consistent fashion. To the contrary, errors that some courts of appeals have deemed presumptively prejudicial have generated judicial controversy or open conflict. For example, in the wake of *Booker*'s holding that mandatory Guidelines were unconstitutional, "a clear and deep multi-circuit conflict [developed] on the proper analysis of plain *Booker* error," including the availability of a presumption of prejudice. U.S. Br. at 19,

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[10] 11-cr-148 Docket entry No. 113, at 2-3, *United States* v. *Grandison* (W.D. Mo. July 23, 2015) (on remand from 781 F.3d 987 (8th Cir. 2015)).

[11] See, for example, three of the Fourth Circuit cases cited in petitioner's chart (Pet. Br. A-6)—*United States* v. *Sanson*, 85 Fed. Appx. 967 (2004); *United States* v. *Moreno*, 67 Fed. Appx. 161 (2003); and *United States* v. *Williams*, 25 Fed. Appx. 175 (2002).

Rodriguez v. *United States*, No. 04-1148 (May 20, 2005). And, although a number of courts have presumed prejudice from the denial of allocution at sentencing, see *United States* v. *Landeros-Lopez*, 615 F.3d 1260, 1264 n.4 (10th Cir. 2010) (collecting cases), that presumption has been questioned as unsound in light of this Court's recent precedents interpreting Rule 52(b). See *United States* v. *Noel*, 581 F.3d 490, 505-506 (7th Cir. 2009) (Easterbrook, C.J., concurring) (rejecting any presumption of prejudice), cert. denied, 562 U.S. 843 (2010); *United States* v. *Reyna*, 358 F.3d 344, 353-356 (5th Cir.) (en banc) (Jones, J., concurring) (same), cert. denied, 541 U.S. 1065 (2004).

Likewise, in the present context, although several courts have adopted a presumption of prejudice for at least some Guidelines errors (Pet. Br. 29-30), those courts differ on the specifics—in particular, whether the presumption applies in all cases or only in cases where a defendant is not sentenced within the overlap between the correct and incorrect ranges. Compare *United States* v. *Putnam*, No. 14-51238, 2015 WL 7694538, at *1 n.2 (5th Cir. Nov. 25, 2015) (noting overlapping-range rule), with *Knight*, 266 F.3d at 210 (3d Cir.) (rejecting that limitation); cf. *United States* v. *Butler*, 777 F.3d 382, 389 (7th Cir. 2015) (reaffirming that a "technical dispute" over which of two overlapping ranges applies can be left unresolved if the reviewing court can reasonably determine that the sentence would have been the same under either range (citation omitted)). That disagreement suggests that experience and intuition do not reliably support this Court's adoption of an across-the-board presumption, as opposed to the normal application of "case-

specific * * * judgment, based upon examination of the record." *Sanders*, 556 U.S. at 407.

2. A presumption is not warranted based on the asserted difficulty of proving case-specific prejudice

Contrary to petitioner's contention (Br. 38-43), a presumption of prejudice is not necessary because of any difficulty in establishing case-specific prejudice from a Guidelines error.

a. As an initial matter, the Court's decision in *Olano* demonstrates that the difficulty of proving prejudice would have to be, as petitioner puts it, "exceptional[]," before a presumption were appropriate. Pet. Br. 38 (quoting *United States* v. *Barnett*, 398 F.3d 516, 526-527 (6th Cir.), cert. dismissed, 545 U.S. 1163 (2005)). The Court in *Olano* explained that a defendant might point to two forms of prejudice arising from the error at issue there, which involved the presence of alternate jurors during deliberations: "the alternates actually participated in the deliberations," or their "presence exerted a 'chilling' effect on the regular jurors." 507 U.S. at 739. The Court recognized, however, that it was unclear that defendants would be able to establish such facts, because juror testimony about deliberations might be barred by Federal Rule of Evidence 606(b), see *id.* at 739-740; see also *Warger* v. *Shauers*, 135 S. Ct. 521, 524 (2014), and the Court had not decided "whether the courts of appeals have authority to remand for [evidentiary] hearings on plain-error review." *Olano*, 507 U.S. at 740. Notwithstanding those difficulties, the Court found no actual prejudice and declined to presume prejudice. *Id.* at 740-741; see *id.* at 742-743 (Kennedy, J., concurring) (acknowledging "these difficulties in proving prejudice," but concluding that "the operation

of Rule 52(b) does not permit a party to withhold an objection * * * and then to demand automatic reversal").

b. Petitioner argues (Br. 39-40) that defendants appealing Guidelines misapplications face such exceptional difficulties because a showing of prejudice depends on a comment by the sentencing judge and, in a "typical case" where the sentence is within the advisory Guidelines range, such a comment will be lacking because the judge is not legally required to give much explanation. Petitioner is mistaken.

A defendant's ability to establish a reasonable probability of a lower sentence does not necessarily depend on "a fortuitous comment by the sentencing judge." Pet. Br. 39 (quoting *Knight*, 266 F.3d at 207). The reviewing court will know, in every Guidelines misapplication case, the nature and magnitude of the error. That information may suggest that, despite the district court's selection of a particular sentence as justified under 18 U.S.C. 3553(a), the error is substantial enough and its impact significant enough that, absent other facts in the record, a reasonable probability exists that the judge would have imposed a different sentence with the correct range in mind. For example, the existing sentence might represent a significant upward variance from the correct range, and no facts might suggest that the court considered such a variance. Cf. *Gall* v. *United States*, 552 U.S. 38, 50 (2008) (finding it "uncontroversial that a major departure should be supported by a more significant justification than a minor one"). Or the Guidelines error may have led the court to over- or under-emphasize relevant facts when selecting a sentence within the (incorrect) range. In such instances, de-

pending on the particular facts, "the circumstances of the case [may] make clear to the appellate judge that the ruling, if erroneous, was harmful." *Sanders*, 556 U.S. at 410.

Beyond the character of the Guidelines error, a reviewing court will have before it the array of information that is routinely developed during "the thorough adversarial testing contemplated by federal sentencing procedure." *Rita*, 551 U.S. at 351. As explained above, pp. 2-3, *supra*, that procedure includes a PSR prepared by the Probation Office, the parties' objections, their resolution by the Probation Office, and eventually a determination by the district court. See Fed. R. Crim. P. 32(f)-(i). The Probation Office may also have recommended a variance or departure from the range that it calculates. See Fed. R. Crim. P. 32(d)(1)(E); cf. PSR ¶ 89 (section providing for such recommendation). The parties will often file sentencing memoranda responding to any such recommendation or proposing non-Guidelines sentences of their own. And, of course, the reviewing court will know whether the judge ultimately chose a within-range sentence, where in the range the sentence fell, and whether the judge structured any other aspect of the sentence to ensure a particular term of imprisonment. See, *e.g.*, *United States* v. *Mazarego-Salazar*, 590 Fed. Appx. 345, 350 (5th Cir. 2014) (judge's "careful * * * structuring" of a separate sentence made it "probable the [judge] would have sentenced [the defendant] differently under the correct Guidelines range"); *United States* v. *Valdez*, 726 F.3d 684, 698 (5th Cir. 2013) (court's decision to run sentences consecutively contributed to showing that Guidelines error was harmless). Parties can marshal all of that

information—as petitioner does here, Br. 42 n.17, 53-54—to establish (or refute) a likelihood of a different sentence under a different range.

Petitioner also errs in asserting (Br. 39) that the kind of comment providing insight into the sentencing judge's rationale will truly be "fortuitous" or rare. This Court's decision in *Rita*, on which petitioner relies, recognizes that even when judges are not obliged to say much, they will "often * * * speak at length to a defendant," a practice that "serve[s] a salutary purpose." 551 U.S. at 357. *Rita* further requires, as do the decisions of the courts of appeals, greater explanation when a judge rejects a party's non-frivolous request for a sentence outside the Guidelines range. *Ibid.*; see, *e.g.*, *United States* v. *Cantu-Ramirez*, 669 F.3d 619, 630 (5th Cir.) ("more [explanation] is required if the parties present legitimate reasons" for a non-Guidelines sentence), cert. denied, 132 S. Ct. 2759, and 133 S. Ct. 247 (2012); cf. *United States* v. *Poulin*, 745 F.3d 796, 800 (7th Cir. 2014) (applying circuit's rule that district court must address a defendant's "principal mitigating argument[s]"). Such requests are a routine part of an advisory Guidelines system in which district courts exercise broad "discretion at sentencing," *Peugh*, 133 S. Ct. at 2080, and may *not* presume that within-Guidelines sentences should be imposed. See *Nelson* v. *United States*, 555 U.S. 350, 352 (2009) (per curiam). Given that district courts impose variance sentences requiring greater explanation in almost a quarter of cases (Pet. Br. 34), have to explain their denials of variance requests in many others, and may choose to "speak at length" in still others, *Rita*, 551 U.S. at 357, it is hard to see why the "typical" federal sentencing

should be viewed as one in which the court will give "little or no explanation," Pet. Br. 39.[12]

For these reasons, demonstrating the prejudicial effect of a Guidelines error is no more difficult than in *Olano*, where the defendants faced potentially serious evidentiary hurdles. 507 U.S. at 740. It is no more difficult than in the context of a plea-colloquy error, where this Court has looked to comments that may not exist in every case and could therefore be dismissed as "fortuitous." See *Dominguez Benitez*, 542 U.S. at 84-85 (defendant's comments at a status conference and the sentencing hearing). And it is no harder than in other sentencing disputes where courts of appeals regularly discern prejudice (or its absence) by reviewing, "in typical appellate-court fashion," *Neder* v. *United States*, 527 U.S. 1, 19 (1999), the entire record. See, *e.g.*, *United States* v. *Sanchez*, 773 F.3d 389, 392-393 (2d Cir. 2014) (misapplication of a mandatory-minimum sentence); *United States* v. *Krul*, 774 F.3d 371, 382-383 (6th Cir. 2014) (Griffin, J., concurring in the judgment) (collecting cases in which courts found, depending on the facts, that sentencing error under *Tapia* v. *United States*, 131 S. Ct. 2382 (2013), either did or did not affect a defendant's substantial rights).

c. Even were petitioner correct about the need for and unlikelihood of finding a specific comment from the sentencing judge in the record, a presumption of prejudice would still be unwarranted. The principal

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[12] That the record in this case does not contain an explanation by the judge, see Pet. Br. 41-42, "does not mean it is categorically 'extraordinarily difficult' for defendant[s in Guidelines cases] to establish prejudice." *Barnett*, 398 F.3d at 537 (Boggs, C.J., concurring in part and dissenting in part).

effect of that presumption is to shift the burden to the government to show that the forfeited error was harmless. See pp. 27-28, *supra*. But assuming that the record in a "typical" forfeited-error case will not contain much evidence on that proposition, it will be hard for the government to carry its burden. Yet the defendant's failure to object would be the primary reason for the lack of evidence. That is because, had the defendant argued that a different range should apply, the judge could have addressed whether (or how) the other range would affect the sentence, thereby providing the evidence that might be needed to show that an error was harmless. See *Zabielski*, 711 F.3d at 389; *United States* v. *Abbas*, 560 F.3d 660, 666-667 (7th Cir. 2009). But without an objection, a judge would be less likely to address alternative ranges. The upshot of petitioner's presumption, therefore, is a rule that "makes it easier to reverse on plain-error review than on harmless-error review," *Noel*, 581 F.3d at 505 (Easterbrook, C.J., concurring), resulting in a windfall for the non-objecting defendant.

This Court's plain-error precedents do not countenance that result. Rather, those decisions make clear that placing "the risk of nonpersuasion" (Pet. Br. 26 n.10) on a forfeiting party is central to protecting the policies underlying Rule 52(b) and that the substantial-rights analysis under the rule therefore cannot devolve into "[w]hether the [g]overnment could have met its burden of showing the absence of prejudice" had the defendant timely objected. *Olano*, 507 U.S. at 741; see *id.* at 742-743 (Kennedy, J., concurring).

3. The policies underlying the plain-error rule weigh strongly against petitioner's proposed presumption

Petitioner contends (Br. 43-53) that a presumption of prejudice will not compromise the policies underlying the plain-error rule and serves salutary purposes. He is mistaken.

a. As explained above, pp. 15-17, *supra*, the plain-error rule reinforces the contemporaneous-objection requirement by providing a strong incentive for timely objections. Petitioner suggests (Br. 50-52) that his presumption does not undermine that interest because, even when defense counsel wants to argue for a variance sentence, it helps to start from a lower Guidelines range. But enforcing the plain-rule error encourages defense counsel to devote full attention to the potential complexities or debatable aspects of the Guidelines calculation at sentencing, which is the proper time for addressing them. Shifting the burden to the government on plain-error review can only weaken counsel's incentive to scrutinize the Probation Office's Guidelines calculations and make timely objections. See *Vonn*, 535 U.S. at 73.[13] Such objections are vital as a general matter. See *Puckett*, 556 U.S. at

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[13] Nothing in the Court's decision in *Henderson*, *supra*, is to the contrary. The Court there doubted that its interpretation of the second prong of the plain-error test would decrease incentives to object because any strategic advantage depended on contingent events—the law changing in a way favorable to the defendant between the time of trial and the time of appeal—and the defendant would still have to satisfy the third and fourth plain-error requirements. 133 S. Ct. at 1128-1129 (cited at Pet. Br. 51). The possibility of plain error in a Guidelines case does not depend on such contingent law-changing events, and the incentives to object provided by third-prong review are precisely what would be drawn into question by petitioner's proposed rule.

133-134. But they are particularly essential in the context of federal sentencing, where the Federal Rules of Criminal Procedure set forth a detailed scheme for presenting and resolving challenges to the PSR, see Fed. R. Crim. P. 32(f)-(i), the document that the district court normally first consults in making its Guidelines determinations. See *Rita*, 551 U.S. at 351; see also pp. 2-3, *supra*.

The asserted complexity of the Guidelines (Pet. Br. 52) makes the need to encourage timely objections all the greater. The type of error here—a miscalculation of a defendant's criminal history category—illustrates the point. Such errors involve determinations that the defendant is often best positioned to challenge. Yet those errors remain distressingly common; indeed, many of the recent Fifth Circuit decisions involving plain-error review in overlapping Guidelines cases feature criminal-history-calculation errors, including two other petitions for certiorari filed contemporaneously with this one. See *United States* v. *De La Torre-De La Torre*, 603 Fed. Appx. 301, 302, cert. denied, 135 S. Ct. 2892 (2015); *United States* v. *Garcia*, 596 Fed. Appx. 270, 272, cert. denied, 135 S. Ct. 2893 (2015).[14] This case thus underscores that, while the prosecutor and district court also failed to notice the errors in these cases, Pet. Br. 51, a case-specific prejudice requirement is necessary to ensure that "defense counsel [stays] on his toes, not just the judge." *Vonn*, 535 U.S. at 73.

b. Petitioner further contends (Br. 49-53) that a presumption is appropriate for these sentencing er-

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[14] See also, *e.g.*, *United States* v. *Blocker*, 612 F.3d 413, 415-417 (5th Cir.), cert. denied, 562 U.S. 1053 (2010); *United States* v. *Campo-Ramirez*, 379 Fed. Appx. 405, 407-410 (5th Cir. 2010).

rors because the costs of resentencing are "modest" in comparison to those resulting from reversal of a jury verdict after trial. This argument for relaxing Rule 52(b)'s strictures in sentencing cases rests on a dubious premise—*viz.*, that courts may hold a defendant to the normal plain-error rigors when the claimed error means the difference between liberty and incarceration, but should be more willing to grant relief that might shorten a duly-convicted defendant's term of imprisonment (or supervised release).

In any event, petitioner underestimates the costs involved. As the en banc Third Circuit recently explained, "[r]esentencing imposes a significant burden on district courts: not only do they have to find time in their busy dockets to revisit errors that could have been resolved with a contemporaneous objection at the original sentencing but they also have the burden of reconvening the parties involved, including the defendant, attorneys, witnesses, and law enforcement authorities." *United States* v. *Flores-Mejia*, 759 F.3d 253, 258 n.6 (2014). Petitioner suggests (Br. 49-50) that such costs could be minimized by having defendants waive their rights to allocute and appear at resentencing. See Fed. R. Crim. P. 32(i)(4)(A)(ii), 43(a)(3). But petitioner offers no reason to believe that defendants are likely to forgo those rights or the concomitant ability to develop evidence of post-sentencing rehabilitation, see *Pepper*, 562 U.S. at 481. Indeed, the government's review of the cases collected in petitioner's chart (Pet. Br. A-2 to A-15) indicates that resentencing hearings were held in all 53 of them.

Petitioner overlooks another significant cost of his rule—a second (or successive) appeal from the resentencing. At least 15 of the 53 cases in petitioner's

chart featured such appeals, see App. B, *infra*, and the case law contains numerous additional examples, see App. C, *infra*. Some of those decisions reveal yet another related cost: having to litigate the scope of a prior remand even in instances where the district court has reimposed the same sentence. See, *e.g.*, *United States* v. *Barnes*, 660 F.3d 1000 (7th Cir. 2011); cf. *Pepper*, 562 U.S. at 505 n.17 (noting authority of courts of appeals to "issu[e] limited remand orders").

Petitioner emphasizes (Br. 52-53) that his rule does not demand automatic reversal because courts retain "discretion under the fourth prong of plain-error review" not to remand. But his reliance on that constraint, too, may be illusory. Petitioner's principal lower-court authority held that Guidelines errors presumptively satisfy the fourth prong as well, *Sabillon-Umana*, 772 F.3d at 1334, even though that rule is in tension with this Court's instruction that "[t]he fourth prong is meant to be applied on a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142. While petitioner does not expressly urge that fourth-prong presumption, he acknowledges (Br. 53) that under his rule courts of appeals will exercise their discretion not to remand only in "unusual" cases. A significant number of the resulting reversals are bound to be "wasteful" ones, see *Dominguez Benitez*, 542 U.S. at 82. Petitioner's chart (Br. 35 n.14, A-2 to A-15) contains multiple examples of plain-error cases where the district court reimposed the same sentence despite a different range, and the same is true of cases involving preserved errors, see App. C, *infra*.[15]

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[15] The case that petitioner identifies (Br. 51) as requiring remand because of "a thoroughly botched sentencing," *United States* v. *Rushton*, 738 F.3d 854, 860 (7th Cir. 2013), provides a different

c. Petitioner's remaining arguments also do not support his proposed presumption. He suggests (Br. 46) that the presumption will actually be a cost-saver by shortening expensive prison sentences. Even putting aside the added costs discussed above, however, avoiding the monetary cost of incarceration is not even a proper ground for a sentencing judge to vary from the Guidelines in an individual case. See *United States* v. *Park*, 758 F.3d 193, 197-199 (2d Cir. 2014). It therefore should not be the basis for adopting a category-wide appellate presumption.

Finally, petitioner asserts (Pet. 46-48) that a preference for remands best respects "the primacy of the district court's role in sentencing." But enforcement of Rule 52(b)'s prejudice requirement honors that role by encouraging the timely objections that allow the district court to "correct or avoid the mistake so that it cannot possibly affect the" sentence that the court imposes. *Puckett*, 556 U.S. at 134. And although petitioner is correct that the district judge is in the best position to perform the sentencing calculus under Section 3553(a) in the first instance, that does not call into question reviewing courts' ability to apply the standards for prejudicial error that have long governed in the sentencing context. See, *e.g.*, *id.* at 141 (government breach of a plea agreement at sentencing); see also *Henderson*, 133 S. Ct. at 1130 (mentioning, in a plain-error case raising a sentencing error

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kind of example. On the defendant's appeal, the court of appeals noticed a Guidelines error that led to a higher advisory range on remand. *Id.* at 860-861. The district court, however, reimposed the same 96-month sentence. 12-cr-10037 Docket entry Nos. 40, 41 (C.D. Ill. Mar. 31, 2014) (Amended Judgment and Sealed Statement of Reasons).

under *Tapia*, that the defendant would have to show an effect on substantial rights).

C. Petitioner's Alternative Argument For Reversal Is Not Fairly Encompassed By The Question Presented And Lacks Merit

Petitioner argues in the alternative (Br. 42 n.17, 53-54) that he is entitled to relief under Rule 52(b) even absent a presumption of prejudice, "because the record shows at least a reasonable probability that the sentence would be lower under the correct Guideline range." That fact-bound argument is not "fairly included" in the question presented, Sup. Ct. R. 14.1(a); see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010), and, in any event, lacks merit.

1. The question in the petition asked only whether courts of appeals applying Rule 52(b) "should * * * presume" that a misapplication of the Sentencing Guidelines "affected the defendant's substantial rights." Pet. i. Having asked the Court to resolve that single legal question, petitioner did not develop in the petition any of the case-specific prejudice claims that he now presents; he mentioned them only in a footnote that summarized the arguments made to and rejected by the court of appeals. Pet. 7 n.2. That passing mention was insufficient to bring his argument before the Court. See *Wood*, 558 U.S. at 304 (even discussing in the text of a certiorari petition an issue not subsumed in the question presented does not bring that issue before the Court). It is also not the type of argument that the Court has reached in cases granted to resolve which legal standard applies in the first place. See *Fry* v. *Pliler*, 551 U.S. 112, 120-121 (2007) (where the Court granted review to resolve which of two harmless-error standards applied on

federal habeas review of a state conviction, petitioner's alternative argument that the court of appeals "misapplied [the more demanding] standard in this particular case" was "not fairly encompassed within the question presented").

Addressing petitioner's case-specific prejudice argument is also inappropriate here because it would not resolve whether petitioner is entitled to relief under the fourth prong on the plain-error test, which vests appellate courts with discretion to remedy an error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citation omitted). As the government argued in the court of appeals, the Guidelines error in this case does not rise to that level. Gov't C.A. Br. 20-22. In particular, the criminal-history scoring rules raised for the first time on appeal assign petitioner no points for two of the five burglaries that he committed in 2008 and 2009, see Pet. Br. 8, leaving him a single point below the criminal history category applied by the district court. See Sentencing Guidelines, Ch. 5, Pt. A (Sent. Tbl.). But the Guidelines themselves recognize that the scoring rules at issue can "result in a criminal history score that underrepresents the seriousness of the defendant's criminal history," and thus provide for an upward departure in the circumstances of this case. *Id.* § 4A1.2, comment. (n.3); see *id.* § 4A1.3(a). Accordingly, petitioner's 77-month sentence aligns with the advice of the Sentencing Commission whether treated as a sentence toward the low end of the range calculated on appeal (70-87 months), or when viewed as the low end of a new range that the district court could reach by departing. Cf. *Rita*, 551 U.S. at 351. In that circumstance, leav-

ing the sentence intact does not undermine the fairness or integrity of judicial proceedings.

2. In any event, petitioner's fact-bound prejudice argument provides no basis for reversal. Petitioner contends (Br. 53-54) that a lower sentence is reasonably probable because the district court sentenced him at the low end of the incorrect range (77-96 months), rejected the government's request for a high-end sentence of 96 months, and did so at a hearing where the parties' arguments "focused on the Guideline imprisonment range." The court's choice of a 77-month sentence, however, did not necessarily signal an intent to sentence petitioner at the low end of any range that might be found applicable on appeal—for example, the much lower range that could apply if petitioner had argued and prevailed on a challenge to his 16-level crime-of-violence enhancement, the one objection he preserved at sentencing. Nor does the parties' gearing of their arguments toward the Guidelines range indicate that a lower sentence would be likely, since petitioner's 77-month sentence remains in the lower half of the corrected (overlapping) range of 70 to 87 months—precisely the scenario in which the Sentencing Commission recognized that the difference in ranges "will not necessarily make a difference in the sentence that the court imposes." Sentencing Guidelines Ch. 1, Pt. A, intro. comment. 1, § 4(h), at 11 (2012). In short, while petitioner has raised a possibility that he would receive a lower sentence under the corrected range, taking into account the specific circumstances of this case, he has not demonstrated the requisite reasonable probability.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
SCOTT A.C. MEISLER
Assistant to the Solicitor General
JENNY C. ELLICKSON
Attorney

DECEMBER 2015

APPENDIX A

1. 28 U.S.C. 391 (1940) provides:

(Judicial Code, section 269.) New trials; harmless error.

All United States courts shall have power to grant new trials, in cases where there has been a trial by Jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

2. Fed R. Crim. P. Rule 32 provides in pertinent part:

Sentencing and Judgment

* * * * *

(d) Presentence Report.

(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

* * * * *

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

* * * * *

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the

presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) **Introducing Evidence; Producing a Statement.** The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) **Court Determinations.** At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

* * * * *

3. Fed. R. Crim. P. Rule 52 provides:

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

4. U.S. Sentencing Guidelines Ch. 1 provides in pertinent part:

Chapter One-Introduction, authority, and general application principles

* * * * *

4. **The Guidelines' Resolution of Maior Issues (Policy Statement)**

* * * * *

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the

maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

* * * * *

5. U.S. Sentencing Guidelines 4A1.1 provides:

§ 4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.

(d) Add 2 points if the defendant committed the instant offense while under any

criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points for this subsection.

6. U.S. Sentencing Guidelines 4A1.2 provides in pertinent part:

§ 4A1.2. **Definitions and Instructions for Computing Criminal History**

(a) **Prior Sentence**

* * * * *

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant

is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. *See also* § 4A1.1(e).

For purposes of applying § 4A1.1(a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

* * * * *

Commentary

Application Notes

* * * * *

3. Upward Departure Provision.—Counting multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were counted as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which the defendant has committed crimes.

7. U.S. Sentencing Guidelines, Ch. 5, Part A provides:

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

APPENDIX B

CASES FROM PETITIONER'S CHART (A-2 TO A-15) IN WHICH THE DEFENDANT OBTAINED REVERSAL OF THE SENTENCE AND APPEALED FROM RESENTENCING

1. *United States* v. *Altagracia Castillo*, 145 Fed. Appx. 683 (1st Cir. 2005) (remanding for resentencing); Judgment, *United States* v. *Altagracia Castillo*, No. 06-1908 (1st Cir. June 12, 2007) (affirming new sentence).

2. *United States* v. *Wallace*, 403 Fed. Appx. 868 (4th Cir. 2010) (remanding); *United States* v. *Wallace*, 477 Fed. Appx. 136 (4th Cir. 2012) (appeal from resentencing).

3. *United States* v. *Hardy*, 322 Fed. Appx. 298 (4th Cir. 2009) (remanding); *United States* v. *Hardy*, 401 Fed. Appx. 850 (4th Cir. 2010) (appeal from resentencing).

4. *United States* v. *Agyepong*, 312 Fed. Appx. 566 (4th Cir. 2009) (remanding); *United States* v. *Agyepong*, 388 Fed. Appx. 343 (4th Cir. 2010) (appeal from resentencing).

5. *United States* v. *Livingston*, 21 F.3d 426 (4th Cir. 1994) (Tbl.) (remanding); *United States* v. *Livingston*, 56 F.3d 62 (4th Cir. 1995) (Tbl.) (appeal from resentencing).

6. *United States* v. *Williams*, 742 F.3d 304 (7th Cir. 2014) (remanding); Order, *United States* v. *Williams*, No. 14-2916 (7th Cir. Mar. 6, 2015) (remanding again on appeal from resentencing).

7. *United States* v. *Avila*, 557 F.3d 809 (7th Cir. 2009) (remanding); *United States* v. *Avila*, 634 F.3d 958 (7th Cir. 2011) (appeal from resentencing).

8. *United States* v. *Garrett*, 528 F.3d 525 (7th Cir. 2008) (remanding); *United States* v. *Garrett*, 307 Fed. Appx. 10 (7th Cir. 2009) (appeal from resentencing).

9. *United States* v. *Plancarte-Vasquez*, 450 F.3d 848 (8th Cir. 2006) (remanding); *United States* v. *Plancarte-Vasquez*, 251 Fed. Appx. 377 (8th Cir. 2007) (appeal from resentencing).

10. *United States* v. *Bonilla-Guizar*, 729 F.3d 1179 (9th Cir. 2013) (remanding); *United States* v. *Bonilla-Guizar*, No. 14-10166 (9th Cir. Apr. 4, 2014) (appeal from resentencing pending); *United States* v. *Calixtro-Bustamante*, No. 14-10241 (9th Cir. May 13, 2014) (appeal from resentencing pending).

11. *United States* v. *Ysassi*, 282 Fed. Appx. 588 (9th Cir. 2008) (remanding); *United States* v. *Ysassi*, 350 Fed. Appx. 149 (9th Cir. 2009) (appeal from resentencing).

12. *United States* v. *Chapple*, 198 Fed. Appx. 745 (10th Cir. 2006) (remanding); *United States* v. *Chapple*, 251 Fed. Appx. 553 (10th Cir. 2007) (appeal from resentencing).

13. *United States* v. *Perez*, 572 Fed. Appx. 787 (11th Cir. 2014) (remanding); *United States* v. *Perez*, No. 15-11920, 2015 WL 8022407 (11th Cir. Dec. 7, 2015) (appeal from resentencing).

14. *United States* v. *Bryant*, 398 Fed. Appx. 561 (11th Cir. 2010) (remanding); *United States* v. *Bryant*, 472 Fed. Appx. 894 (11th Cir. 2012) (appeal from resentencing).

15. *United States* v. *Bennett*, 472 F.3d 825 (11th Cir. 2006) (remanding); *United States* v. *Bennett*, 265 Fed. Appx. 753 (11th Cir. 2008) (appeal from resentencing).

APPENDIX C

RECENT EXAMPLES OF NON-PLAIN-ERROR CASES IN WHICH REIMPOSITION OF THE SAME SENTENCE WAS AFFIRMED ON APPEAL

1. *United States* v. *Barnes*, 660 F.3d 1000, 1002, 1004-1005 (7th Cir. 2011) (affirming reimposition of 292-month sentence as to one defendant and 188-month sentence as to another).

2. *United States* v. *Butters*, 588 Fed. Appx. 12, 12-13 (2d Cir. 2014) (affirming reimposition of 70-month sentence); see *United States* v. *Butters*, 513 Fed. Appx. 103, 104, 106 (2d Cir. 2013) (original 70-month sentence reversed).

3. *United States* v. *Chivers*, 559 Fed. Appx. 307, 308 (5th Cir. 2014) (affirming reimposition of 57-month sentence); see *United States* v. *Chivers*, 488 Fed. Appx. 782, 784, 789-790 (5th Cir. 2012) (original 57-month sentence reversed).

4. *United States* v. *Hollander*, 249 Fed. Appx. 767, 768 (11th Cir. 2007) (affirming reimposition of 51-month sentence).

5. *United States* v. *Jones*, 701 F.3d 328, 329-331 (8th Cir. 2012) (affirming reimposition of 384-month sentence).

6. *United States* v. *Lewis*, 496 Fed. Appx. 425, 426, 428-429 (5th Cir. 2012) (affirming reimposition of 360-month sentence).

7. *United States* v. *Rodriguez*, No. 12-41314, 2013 WL 3727214, at *1 (5th Cir. July 17, 2013) (affirming reimposition of 324-month sentence).

8. *United States* v. *St. Vallier*, 488 Fed. Appx. 628, 631-632 (3d Cir. 2012) (affirming reimposition of 204-month sentence).

9. *United States* v. *Vazquez*, 588 Fed. Appx. 596, 597-598 (9th Cir. 2014) (affirming reimposition of 144-month sentence); see *United States* v. *Gonzalez Vazquez*, 719 F.3d 1086, 1087, 1092-1093 (9th Cir. 2013) (original 144-month sentence reversed).

10. *United States* v. *Walpole*, 599 Fed. Appx. 56, 57 (3d Cir.) (affirming reimposition of 600-month sentence), cert. denied, 136 S. Ct. 155 (2015); see *United States* v. *Walpole*, 543 Fed. Appx. 224, 230-231 (3d Cir. 2013) (original 600-month sentence reversed).

No. 14-8913

In The
Supreme Court of the United States

SAUL MOLINA-MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

MARJORIE A. MEYERS
Federal Public Defender
SOUTHERN DISTRICT OF TEXAS
TIMOTHY CROOKS*
LAURA FLETCHER LEAVITT
Assistant Federal Public Defenders
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
(713) 718-4600
tim_crooks@fd.org
Counsel for Petitioner

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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ARGUMENT

A CLEAR MISAPPLICATION OF THE SENTENCING GUIDELINES WARRANTS A REBUTTABLE PRESUMPTION THAT THE ERROR AFFECTED SUBSTANTIAL RIGHTS.

A. The Plain-Error Rule Is a "Fairness-Based Exception" to the Contemporaneous-Objection Rule and Allows for the Redress of "Obvious Injustice" even in the Absence of a Timely Objection.

Throughout its brief, the Government trumpets one theme, namely: the vindication of the contemporaneous-objection rule. The Government believes that, unless the plain-error rule is construed as narrowly as possible, the contemporaneous-objection rule will be set at naught, and the benefits of that rule lost.

No one disputes that the contemporaneous-objection rule is important. But even diligent attorneys and judges sometimes make mistakes, and "[t]he plain-error doctrine of Federal Rule of Criminal Procedure 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement." *United States v. Young*, 470 U.S. 1, 15 (1985) (footnote omitted). It does so in order "that obvious injustice [may] be promptly redressed," even in the absence of a timely objection. *United States v. Frady*, 456 U.S. 152, 163 (1982). In short, "the basic purpose of Rule 52(b) [is] the creation of a fairness-based exception to the general requirement that an objection be made at

trial." *Henderson v. United States*, 133 S. Ct. 1121, 1129 (2013) (citation omitted); *see also, e.g.*, *United States v. Escalante-Reyes*, 689 F.3d 415, 422 (5th Cir. 2012) (*en banc*) ("the purpose of plain error review in the first place is so that justice may be done") (citation omitted). In its focus on the contemporaneous-objection rule, the Government loses sight of that purpose of redress of "obvious injustice."

And there are few greater injustices than excess imprisonment. As the Tenth Circuit has written, "we can think of few things that affect an individual's substantial rights more than a reasonable probability an individual will linger longer in prison than the law demands only because of an obvious judicial mistake." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1335 (10th Cir. 2014). In a related vein, this Court has held that, under the Sentencing Guidelines, ***any*** amount of excess imprisonment constitutes prejudice for purposes of the prejudice inquiry in a claim of ineffective assistance of counsel, *see Glover v. United States*, 531 U.S. 198, 203-04 (2001) – the same inquiry, this Court has held, as that required by the third prong of plain-error review. *See United States v. Dominguez Benitez*, 542 U.S. 74, 81-83 (2004).

The type of error at issue in this case – the application of an incorrect Guideline range – is peculiarly likely to result in the "obvious injustice" of excess imprisonment. As this Court has recognized, because of the continuing centrality of the Sentencing Guidelines to federal sentencing, the application of an erroneously high Guideline range is, by its nature,

likely to result in more imprisonment than a defendant would receive under the correct, lower range. *See Peugh v. United States*, 133 S. Ct. 2072, 2083-84 (2013). Yet, as lower courts have recognized, the particular effect of this type of error is peculiarly difficult to discern in a given case, especially when the district court believes that it is sentencing within the correct Guideline range.

For these reasons, in the unique and limited context of a forfeited error in the Guideline range applied to a defendant, "the rule of forfeiture should bend slightly," *United States v. Ross*, 77 F.3d 1525, 1539 (7th Cir. 1996), to avoid the "obvious injustice" of excess imprisonment, and courts should presume, subject to rebuttal, that the error affected the defendant's substantial rights. Such a modest presumption, applying to only one of the four components of the plain-error rule, fits comfortably into the Court's precedents and properly helps to avoid the injustice and unfairness of excess imprisonment.

B. The Government Misapprehends the Import of this Court's Plain-Error Precedents for the Question Presented.

Although the Government does discuss in its brief the Court's decision in *United States v. Olano*, 507 U.S. 725 (1993), and the Court's post-*Olano* plain-error cases, the Government's discussion of *Olano* is incomplete, and the Government overreads the Court's post-*Olano* plain-error cases.

1. ***Olano.***

In *Olano*, the Court not only recognized the possibility of satisfying the third prong of plain-error review by a presumption of prejudice, *see Olano*, 507 U.S. at 735, but also discussed at some length whether the error there qualified for such a presumption. *See id.* at 739-41. This careful consideration of whether a presumption of prejudice should be applied is at odds with the Government's dismissive treatment of such presumptions.

The Government is also off-base when it asserts that "the most logical interpretation of *Olano* is that only those errors that might, in constitutional analysis, warrant a presumption of prejudice could be so treated under Rule 52(b)." Resp. Br. 21 (citations omitted). If the Court had meant to limit the presumption of prejudice to certain constitutional errors, it presumably would have said so. Moreover, there would have been no reason to consider whether the ***nonconstitutional*** error at issue in *Olano* – a violation of Fed. R. Crim. P. 24(c) – warranted application of a presumption of prejudice. *See Olano*, 507 U.S. at 739-41.

Principally, however, the Government relies upon the following passage from *Olano*:

> When the defendant has made a timely objection to an error and [Federal] Rule [of Criminal Procedure] 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record – a so-called

> "harmless error" inquiry – to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error "does ***not*** affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error ***does*** "affec[t] substantial rights."

Id. at 734-35 (internal citations omitted; emphasis in original). According to the Government, "[t]he possibility that courts could create such burden-shifting presumptions under Rule 52 itself would contradict *Olano*'s emphasis on the 'important difference' between the two subparts of Rule 52, under which the burden is 'shift[ed]' to the defendant under Rule 52(b) to show that a forfeited error affected his substantial rights." Resp. Br. 21 (citations and footnote omitted; brackets added by Government; further citation omitted); *see also* Resp. Br. 27-28.

The Government's reliance on this "important difference" language is misplaced. As an initial matter, it is not at all clear that "[p]etitioner's proposed presumption of prejudice [] would shift the burden

right back to the government." Resp. Br. 27 (citations omitted). Rather, *Olano* seems to contemplate that the presumption is simply an alternative way for the defendant to satisfy his burden of establishing an effect on substantial rights, subject to rebuttal by the Government.

In discussing whether a presumption of prejudice should apply to the error at issue in *Olano* (allowing alternate jurors to be present during jury deliberations, in violation of Fed. R. Crim. P. 24(c)), the Court pointedly noted that "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberation and thereby its verdict?" *Olano*, 507 U.S. at 739. In other words, the Court not only aligned the presumption of prejudice with a case-specific analysis of prejudice, but it also made clear that, even with a presumption of prejudice, the "ultimate inquiry" is still whether the error affected the defendant's substantial rights – the same language as in Rule 52(b), which, the Court held, signaled that the defendant bore the burden of persuasion. *See id.* at 734-35. And the Court further suggested that a presumption of prejudice was simply an alternative way for defendants to satisfy their burden of showing an effect on substantial rights when the Court wrote: "The question, then, is whether the instant violation of Rule 24(c) prejudiced respondents, either specifically or presumptively." *Id.* at 739.

All of this is to say that the presumption of prejudice discussed in *Olano*, and argued for by petitioner

here, does not shift the burden of persuasion to the Government or elide the "important difference" between Rule 52(a) and Rule 52(b), as the Government argues. To the contrary, *Olano* suggests that the burden remains with the defendant, but it is, in a limited class of cases, open to the defendant to meet his burden by showing that he was prejudiced "either specifically or presumptively," *id.* – that is, in either a case-specific or a generalized way. *See also United States v. Marcus*, 560 U.S. 258, 270 (2010) (Stevens, J., dissenting) (observing that the relevant question is "whether the error in question affected substantial rights ***(either in a particular defendant's case or in the mine run of comparable cases)***") (emphasis added).

But even if a presumption of prejudice is conceptually viewed as shifting the burden of persuasion to the Government, rather than simply providing a defendant with an alternative method of meeting his burden of persuasion in a limited class of cases, the Court in *Olano* obviously did not believe that such burden-shifting was necessarily incompatible with its interpretation of Rule 52(b). In this regard, it is critical to note that the "important difference" passage from *Olano*, quoted above, was almost immediately followed by the Court's reference to the possibility of "a special category of forfeited errors that can be corrected regardless of their effect on the outcome," *Olano*, 507 U.S. at 735 – *i.e.*, structural errors – and then to "those errors that should be presumed prejudicial if the defendant cannot make a

specific showing of prejudice." *Id.* If the Court had meant, by the "important difference" passage, to establish an immutable rule that there could be no correction of forfeited errors without the defendant's demonstrating some prejudice, then there would have been no point in discussing nonexistent exceptions to that rule. In fact, the Government's "important difference" argument proves too much because it would scuttle not only *Olano*'s presumed-prejudice exception, but also its exception for structural errors.

That the Court did not want to establish such an immutable rule is perhaps best demonstrated, however, by the fact that the Court took pains to say only that ***"[i]n most cases***, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *Olano*, 507 U.S. at 734 (emphasis added). But "most cases" does not mean "all cases," and *Olano* thus pointedly left the door open to the possibility of defendants' satisfying the third prong by methods other than demonstrating case-specific prejudice.

2. The Court's Post-*Olano* Plain-Error Cases.

The Government correctly notes that, since *Olano*, the Court "has never again suggested that some category of errors might be presumptively prejudicial under Rule 52(b)," Resp. Br. 21 (footnote omitted), even though "the Court has continued to reserve the question whether structural errors might affect substantial rights regardless of their actual impact on an

appellant's trial." *Ibid.* (internal quotation marks and citations omitted). Rather, the Government notes, the Court's post-*Olano* plain-error cases have been resolved by (1) finding that the error in question was not structural, and (2) finding that the defendant had not met his burden of showing case-specific prejudice. *See* Resp. Br. 20-24. The implication is that the Court, without explicitly saying so, must have rejected the applicability of presumptions of prejudice.

That implication is incorrect. The fact that the Court did not mention the presumption of prejudice in any of those cases means only that the Court did not believe that those cases presented that issue. Those cases certainly do not represent a *sub silentio* repudiation of the Court's discussion of presumed prejudice in *Olano*. Thus, contrary to the Government's implication, *Olano*'s second exception to a specific showing of case-specific prejudice – namely, the exception for "errors that should be presumed prejudicial [even] if the defendant cannot make a specific showing of prejudice," *Olano*, 507 U.S. at 735 – remains "essentially in the same place [it] w[as] after *Olano*." Brent Ferguson, *Plain Error Review and Reforming the Presumption of Prejudice*, 44 N.M. L. Rev. 303, 309 (2014).

Nevertheless, the Government claims to glean from the Court's post-*Olano* cases "two principles that suffice to resolve this case." Resp. Br. 24. First, invoking language from *Marcus*, the Government asserts that "when a non-structural error 'come[s] in various shapes and sizes' and creates varying 'degree[s] of

harm,' Rule 52(b) requires the party that forfeited the claim of error to make 'a showing of individual prejudice.'" Resp. Br. 24-25 (citations omitted; brackets added by Government). Second, says the Government, "when a 'procedural error[ ] at sentencing' is 'amenable' to review for harmlessness, Rule 52(b) holds the defendant to his 'usual burden of proving prejudice.'" Resp. Br. 25 (citation omitted; brackets added by Government).

As an initial matter, the Court did not, in making these statements, purport to be setting forth broad-ranging "principles" for plain-error review generally, much less for the particular question presented here. Indeed, these statements were made in the context of cases which, as discussed above, did not discuss the presumption of prejudice at all, but focused only on the distinction between structural errors and errors for which a conventional prejudice inquiry was indicated. Viewed in that context, the relevance of those statements to the question presented here is questionable. In any event, those statements do not support the application of the Government's "two principles" in this case.

First, the type of error discussed in *Marcus* – a jury-instruction error – was accurately described as "com[ing] in various shapes and sizes," with varying "kind[s] and degree[s] of harm." *Marcus*, 560 U.S. at 265. This is so for two reasons: (1) a jury instruction can deal with all sorts of different things (*e.g.*, procedural matters like taking notes, avoiding publicity, or the burden of proof, or substantive matters, like the

elements of a crime or components of a defense); and (2) a trial has many moving parts, and innumerable factors can make an erroneous jury instruction harmful in one case, but harmless in another – *e.g.*, the weight and strength of the evidence, the Government's theory of prosecution, and the parties' arguments to the jury.[1]

The application of an erroneous Guideline range is not like these other types of errors. The application of an erroneous Guideline range is a category of error that does not come in various shapes and sizes. Although an erroneous Guideline range may result from the misapplication of numerous different Guideline provisions, it is a single error that generally produces a single harm – a sentence greater than it would have been under the correct Guideline range. Put another way, unlike the multifarious categories of errors discussed in the Court's previous third-prong

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[1] The same is true of the errors at issue in *Olano* (an impermissible intrusion upon the jury), and *Jones v. United States*, 527 U.S. 373 (1999) (a jury-instruction error in the penalty-phase of a federal capital case). It is also true of the error at issue in *Puckett v. United States*, 556 U.S. 129 (2009), because (1) a plea agreement can involve all sorts of diverse promises by the Government, and (2) the breach of a plea agreement may have widely varying effects upon a defendant, depending upon the obligation that was breached. It is also true of the error at issue in *Dominguez Benitez* because (1) Federal Rule of Criminal Procedure 11 has a substantial number of different advisements required for a guilty-pleading defendant, and (2) the effect of an omission of any one or more of those pieces of advice will vary widely, depending on the circumstances of the particular case.

cases, the error of using the wrong Guideline range is a monolithic error that is uniquely likely to have an effect on the outcome of the proceeding. Indeed, it is difficult to imagine any other type of error that is so likely to have an effect on the outcome.[2]

With respect to the second of the Government's "two principles," no one doubts that Guideline-range errors, like most non-structural errors, are sometimes "amenable" to conventional prejudice analysis. The problem is that often Guideline-range errors are not amenable to such analysis because (for institutional reasons discussed in petitioner's opening brief, *q.v.* at 38-43, and below) the record will often not reflect how the Guideline range factored into the district court's decision. That reality, coupled with the reality that the application of the wrong Guideline range likely ***does*** affect the district court's sentencing decision, are the principal reasons why the Court should endorse the presumption of prejudice adopted by the Third and Tenth Circuits.

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[2] To the extent that the Government appears to rely (*see* Resp. Br. 25) on the differing "degrees" of Guideline-range error – *i.e.*, the extent, great or small, to which the sentence diverges from the correct Guideline range – that reliance is misplaced in light of the Court's decision in *Glover*, 531 U.S. at 203-04, which made clear that ***any*** amount of excess imprisonment constitutes prejudice for purposes of the prejudice inquiry in a claim of ineffective assistance of counsel (the same inquiry as that required by the third prong of plain-error review, *see Dominguez Benitez*, 542 U.S. at 81-83).

C. The Use of an Erroneous Guideline Range Is an Appropriate Circumstance for Application of a Rebuttable Presumption of Prejudice.

1. Introduction.

As noted above, whether the presumption of prejudice referred to in *Olano* is simply an alternative means for a defendant to meet his burden of showing prejudice (as *Olano* suggests), or whether (as the Government would have it) it represents a formal shifting of the burden of persuasion, the Government has not pointed to anything in the Court's cases since *Olano* that rules out such a presumption. And, as petitioner discussed in his opening brief, *q.v.* at 26-30, a rebuttable presumption of prejudice is appropriate in a criminal case where (1) the "natural effect" of a particular type of error is to affect a defendant's substantial rights (*i.e.*, where empirical evidence and experience suggest that a particular type of error is, across the board, likely to have an effect on the outcome), *see Shinseki v. Sanders*, 556 U.S. 396, 411 (2009); *Kotteakos v. United States*, 328 U.S. 750, 765-66 (1946),[3] and (2) the nature of the error makes it

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[3] Although the Government disputes the relevance of *Kotteakos* to the question presented here, *see* Resp. Br. 32 n.6, the fact is that the Court has more than once relied upon *Kotteakos* in construing the third, "affects substantial rights" prong of Rule 52(b). *See Dominguez Benitez*, 542 U.S. at 81; *Olano*, 507 U.S. at 734. And, although *Kotteakos* dealt with preserved error rather than forfeited error, *Olano* makes clear that the "affects substantial rights" inquiry is the same under Rule 52(b) (plain error) as

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likely that "the defendant cannot make a specific showing of prejudice." *Olano*, 507 U.S. at 735.

This two-part test, grounded in this Court's cases and applied by lower courts, provides a workable test for when courts should apply the presumption of prejudice referred to in *Olano*. The two parts of that test, properly understood, constitute meaningful limiting principles that will make such presumptions rare and will not upset Rule 52(b)'s "careful balancing" of the need to encourage contemporaneous objections "against [the] insistence that obvious injustice be promptly redressed." *Frady*, 456 U.S. at 163 (footnote omitted).

2. The "Natural Effect" of the Use of an Erroneously High Guideline Range Is Excess Imprisonment.

The first part of the two-part test for application of a presumption of prejudice is whether empirical evidence and experience lead the courts to conclude that the "natural effect" of a particular type of error is to affect a defendant's substantial rights. Although the Government asserts that "[t]he courts of appeals to adopt a presumption of prejudice for Guidelines errors [] have not done so based on those criteria," Resp. Br. 35, that assertion is incorrect. Both the Third Circuit and the Tenth Circuit, after surveying

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it is under Rule 52(a), except for the question of who bears the burden of showing that effect. *See Olano*, 507 U.S. at 734-35.

the jurisprudence of the federal courts of appeals (perhaps the best source of "empirical evidence" and "experience" on this point), concluded that the natural effect of a Guideline error is to affect the sentence. *See Sabillon-Umana*, 772 F.3d at 1333-34; *United States v. Knight*, 266 F.3d 203, 207-09 (3d Cir. 2001).

Moreover, the Government admits that "Sentencing Commission data indicate that the Guidelines continue to play a central role in federal sentencing, as they must in a system that treats them as the 'starting point' in every sentencing." Resp. Br. 36 (citing *Peugh*, 133 S. Ct. at 2083 & 2084). The Government then omits further discussion of *Peugh*, however,[4] and proceeds to critique petitioner's informal survey of overlapping-range plain-error cases on the ground that the overwhelming trend shown by that survey – namely, that a lower Guideline range on remand is associated with a lower sentence on remand – may be attributable to other factors. *See* Resp. Br. 36-37. From this, the Government concludes that "[t]he empirical evidence sheds little reliable light on the 'natural effect' of Guidelines errors as a category." Resp. Br. 37.

The Government, however, ignores the fact that, in *Peugh*, the Court agreed that there was "considerable empirical evidence indicating that the Sentencing

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[4] The Government likewise does not respond at all to petitioner's discussion of the unique "anchoring" effect of the Sentencing Guidelines. *See* Pet. Br. 36-37 n.15.

Guidelines have the intended effect of influencing the sentences imposed by judges." *Peugh*, 133 S. Ct. at 2084. This consideration – along with the Court's recognition of the systemic primacy of the Guidelines even after *United States v. Booker*, 543 U.S. 220 (2005), *see Peugh*, 133 S. Ct. at 2083-84 – led the Court to conclude that "[a] retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation." *Id.* at 2084.

In sum, (1) *Peugh*, (2) the available empirical evidence, and (3) the accumulated experience of the numerous federal appellate courts that have, explicitly or implicitly, presumed prejudice from the application of an erroneously high Guideline range, all support the conclusion that the "natural effect" of that error is to skew the sentence higher. To the extent that the Government demands more certainty about this "natural effect" than these sources provide, the Government's demand is inconsistent with this Court's pronouncement that the third prong of plain-error review requires only a "reasonable probability" of a different result, *see Dominguez Benitez*, 542 U.S. at 83 – a standard that "is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Id.* at 83 n.9 (citation omitted).

3. The Difficulty, in a Typical Case, of Showing the Effect of an Erroneous Guideline Range on the Sentence Ultimately Imposed also Counsels in Favor of a Rebuttable Presumption of Prejudice.

The Government also argues that there is no special difficulty in discerning the effect of an erroneous Guideline range on the sentence ultimately imposed. *See* Resp. Br. 39-43. The Government first asserts that in some instances, it may be clear that such an error was or was not harmless. *See* Resp. Br. 40-41. Petitioner does not dispute that proposition, *see* Pet. Br. 44-45 n.18, but it does not mean that a presumption is not appropriate as a general matter. *See Sabillon-Umana*, 772 F.3d at 1334.

The Government hypothesizes that defendants will often be able to make a showing of harm from Guideline-range error from "the array of information that is routinely developed during" the federal sentencing process, and from "whether the judge ultimately chose a within-range sentence, where in the range the sentence fell, and whether the judge structured any other aspect of the sentence to ensure a particular term of imprisonment." Resp. Br. 41 (citations omitted). However, almost all of those things were present in the instant case, but neither the Fifth Circuit, nor the Government in its brief, *q.v.* at 52, found them adequate to establish prejudice.

The Government also seems to believe that explanations for within-Guideline sentences are much

more extensive than they generally are. *See* Resp. Br. 42-43. As noted in petitioner's opening brief, *q.v.* at 38-41, however, where a district court sentences within what it believes to be the Guideline range, generally little or no explanation is required – and the instant case is a textbook example of that principle. And, even where a defendant argues for a sentence outside the Guideline range (here petitioner did not), any explanations for rejecting those arguments are unlikely to shed any light on the very different question of what the district court would do if it were confronted with a different Guideline range.

Finally, it is telling that two circuits – the Third and the Tenth – have explicitly concluded that "absent a fortuitous comment by the sentencing judge on the record, it is very difficult to ascertain the impact of [a Guideline-application error]." *Knight*, 266 F.3d at 207; *see also Sabillon-Umana*, 772 F.3d at 1333-34. This conclusion, undoubtedly drawn from "empirical evidence" (countless sentencing transcripts and records) and "experience" (those courts' review of those transcripts and records), is entitled to respect, and is not contradicted by any other circuit.[5]

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[5] Indeed, it seems likely that the same conclusion may underlie the implicit presumption of prejudice applied by other circuits.

4. A Rebuttable Presumption of Prejudice Better Respects the Primacy of the District Court's Role in Sentencing.

It is also worth highlighting that a sentence within the correctly calculated Guideline range may be (and in many circuits is) presumed to be substantively reasonable, because of the double assurance conferred by the concordance between the sentence recommended by the expertise of the Sentencing Commission and the sentence selected by the sentencing judge. *See Rita v. United States*, 551 U.S. 338, 347-51 (2007). The corollary to this unusual presumption of reasonableness, however, is that when the sentence is imposed without the benefit of the ***correct*** Guideline range, and thus without the correct expert advice of the Sentencing Commission, appellate courts should be especially loath to assume that knowing the correct range would have made no difference in the district court's sentence.

In a related vein, over 20 years ago, the Court rejected the notion that a sentence could be affirmed, even in the face of an acknowledged error in the Guidelines, simply because the appellate court deemed the sentence to be reasonable; rather, said the Court, the appellate court must be sure that the district court would have imposed the same sentence even in the absence of the error. *See Williams v. United States*, 503 U.S. 193, 201-05 (1992). Along the way, the Court stressed that "[t]he selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in

certain circumstances, are decisions that are left solely to the sentencing court," *id.* at 205 (citation omitted), and that "it is the prerogative of the district court, not the court of appeals, to determine, in the first instance, the sentence that should be imposed in light of certain factors properly considered under the Guidelines." *Id.*

Especially given the unique centrality of the Guidelines, *see Peugh*, 133 S. Ct. at 2083-84, even where an error in the calculation of the Guideline range has been forfeited, a presumption of prejudice better respects "the prerogative of the district court to determine, in the first instance, the sentence that should be imposed in light of [the correct Guideline range]." *Williams*, 503 U.S. at 205. Because the Guidelines generally do make a difference to a district court's sentences, it is appropriate, and more respectful of the institutional role of the district court, to presume that a mistaken range did make a difference and then to remand to the district court to reassess the sentence in light of the correct range – unless, of course, the record clearly shows no reasonable probability that the mistaken range affected the sentence.[6]

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[6] The Government argues that this role could be honored by a contemporaneous objection, which would allow the district court to address the Guideline error and determine the effect of that error in the first place, without the need for an appeal. *See* Resp. Br. 49. Of course it could, but that is not the point here. The point, rather, is this: because a Guideline-range error is,

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5. The Proposed Presumption of Prejudice Will Not Upset Rule 52(b)'s "Careful Balancing" of Interests.

The Government contends that the proposed presumption of prejudice "can only weaken counsel's incentive to scrutinize the Probation Office's Guidelines calculations and make timely objections," Resp. Br. 45 (citation omitted), which, the Government asserts, "are particularly essential in the context of federal sentencing . " Resp. Br. 46 (citations omitted).[7] The Government further claims that "petitioner's presumption makes it easier to reverse on plain-error review than on harmless-error review, resulting in a windfall for the non-objecting defendant." Resp. Br. 44 (internal quotation marks and citation omitted).

The Government's arguments are without merit. Even if, in some cases at the margins, it will be harder for the Government to show that an unobjected-to Guideline error was harmless, failure to object still subjects a defendant to two significant obstacles to relief. First, unlike the case where a timely objection is made, a defendant cannot receive appellate relief

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across the board, peculiarly likely to affect the sentence imposed, an appellate court that nevertheless assumes that such an error would make no difference in the sentence is treading dangerously close to usurping the district court's sentencing function.

[7] The Government apparently does not dispute petitioner's contention that "sandbagging" – *i.e.*, the strategic withholding of an objection below – is unlikely to be a concern for this type of error. *See* Pet. Br. 50-51.

for an unobjected-to Guideline error unless he shows that the error is "plain," *i.e.*, "clear or obvious, rather than subject to reasonable dispute." *Puckett*, 556 U.S. at 135 (citation omitted). Second, even where the first three prongs of plain-error review are satisfied, under the fourth prong of plain-error review, correction of the error remains discretionary, with that discretion "to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks, brackets, and citations omitted).

These requirements provide plenty of incentive to make objections because they do make securing relief on plain-error review much more difficult. *Cf. Henderson*, 133 S. Ct. at 1130 (noting the "screening" function performed by the second and fourth prongs of plain-error review). Courts have, with some frequency, declined to reverse Guideline-application errors on plain-error review either because the error was not "plain,"[8] or because the case did not meet the fourth prong of plain-error review.[9] And, although the Government fears that the courts of appeals will misapply the fourth prong, *see* Resp. Br. 48, that fear runs counter to this Court's recognition that lower

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[8] *See, e.g.*, *United States v. Jasso*, 587 F.3d 706, 713 (5th Cir. 2009) (finding Guideline error, but finding that the error was not "plain" "[b]ecause until now the error has been anything but obvious").

[9] *See, e.g.*, *United States v. Duque-Hernandez*, 710 F.3d 296, 298-99 (5th Cir.), *cert. denied*, 134 S. Ct. 450 (2013).

courts "are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

A final point must be made. In the more than 20 years since *Olano*, the lower federal appellate courts have been remarkably restrained in their deployment of presumptions of prejudice. As set out in petitioner's opening brief, *q.v.* at 29-30 & n.11, the courts of appeals have identified only four classes of errors qualifying for a presumption. But, by far the most prevalent of these presumptions is the explicit or implicit presumption that an error in the application of the Sentencing Guidelines affects a defendant's substantial rights.[10] *See* Pet. Br. 29-30 & n.12. The fact that a presumption of prejudice, though generally so rare, has so overwhelmingly been used in the context of Guideline-application errors, speaks volumes. It shows that lower federal courts, drawing upon their considerable experience, have concluded that (1) Guideline-application errors, perhaps more than any other type of error, are uniquely likely to affect the outcome of the proceedings, but (2) it is also uniquely difficult to demonstrate that effect in many cases. It also suggests that the lower courts have

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[10] In a decision rendered after petitioner's opening brief was filed, even the Fifth Circuit acknowledged that it applies a presumption of prejudice to Guideline-range errors not resulting in overlapping ranges. *See United States v. Putnam*, 806 F.3d 853, 855-56 & n.2 (5th Cir. 2015).

concluded that such a presumption is necessary to ensure "that obvious injustice [may] be promptly redressed," even in the absence of a timely objection. *Frady*, 456 U.S. at 163. This Court should reach the same conclusions, and should adopt a rebuttable presumption that a Guideline-range error affected a defendant's substantial rights.

D. Even if the Court Does Not Adopt a Presumption of Prejudice, the Court Should Reverse the Judgment Below.

As petitioner explained in his opening brief, *q.v.* at 53-54, even if the Court does not adopt a presumption of prejudice, the Court should still conclude, contrary to the Fifth Circuit, that petitioner has shown at least a reasonable probability of a lower sentence under the correct Guideline range. The Government claims that the question of case-specific prejudice is not "fairly included" in the question presented in the petition for certiorari because "[i]t is [] not the type of argument that the Court has reached in cases granted to resolve which legal standard applies in the first place." Resp. Br. 50 (citation omitted). But, in fact, the Court has sometimes gone on to decide the merits of a lower-court judgment even after resolving the question presented against the petitioner.[11] In any

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[11] *See, e.g.*, *Alaska Dep't of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461, 496 (2004) (holding that the question presented – whether the EPA had authority over a matter – embraced the case-specific issue of

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event, the Court has the power to address issues that were neither "fairly included" in the question presented nor presented in the court of appeals. *See, e.g.*, *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). Here, the issue was presented in, and decided by, the Fifth Circuit, and its resolution by this Court would provide useful guidance to the lower courts. Therefore, even if the Court does not agree that a presumption of prejudice is warranted, the Court should still decide whether petitioner has made a sufficient showing of case-specific prejudice.

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whether, assuming the EPA had the authority, it had abused that authority); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 853-58 (1982); *see also id.* at 859 (White, J., concurring in the result) (observing that the Court had granted certiorari to review the legal standard used by the court of appeals, but, after implicitly endorsing that standard, had then reversed on the ground that the court of appeals had misapplied the clearly-erroneous rule by "setting aside factual findings that were not clearly erroneous," which was not "fairly included" in the question presented).

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
SOUTHERN DISTRICT OF TEXAS
TIMOTHY CROOKS*
LAURA FLETCHER LEAVITT
Assistant Federal Public Defenders
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
(713) 718-4600
tim_crooks@fd.org
Counsel for Petitioner

**Counsel of Record*